FOR ARGUMENT

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No. 78-1815

IN THE

Supreme Court of the United States

October Term, 1979

CECIL D. ANDRUS,
Secretary of the Interior,
Petitioner,

v.

SHELL OIL COMPANY and
D. A. SHALE, INC.
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

QUESTION PRESENTED

Whether the Department of the Interior's recognition of oil shale as a valuable mineral eligible for claim location and patent was known to and accepted and endorsed by Congress when it enacted the Mineral Leasing Act of 1920, and Interior's subsequent administration of the oil shale lands in conformity with recognition of the value of oil shale was subsequently confirmed by Congress, so as to

preclude Interior from retroactive repudiation of its prior view and practice by administrative fiat.

REASONS FOR BRIEFING THREE ADDITIONAL QUESTIONS

Uncertainties as to the scope of the review that the Court wishes to give this case make it necessary for respondents to brief three additional questions. The uncertainties arise from these circumstances. The petitioner originally sought review only of the question stated above. The respondents opposed the petition, but requested that, if it were granted, review should not be confined to the single question decided by the court of appeals and presented by the petition but should include, as well, the other three questions decided by the district court. Under Rule 23(1)(c) the order of this Court granting certiorari related only to the single question presented in the petition. Notwithstanding this, the petitioner's brief has argued not only that question but has argued as well one of the three other questions decided by the district court. Therefore, to seek clarification of the uncertainty as to the scope of review in these circumstances, the respondents moved the Court either to limit the petitioner's brief to the question covered by the petition for certiorari or to extend the order granting certiorari to the other three questions decided by the district court. This motion was denied by order dated December 3, 1979. It is in light of these circumstances that it becomes necessary for the respondents to brief not only the question set forth above but also the three further questions that were likewise decided by the district court in granting summary judgment to the respondents. Those three additional questions are:

1. Whether the oil shale deposits of the Green River Formation satisfied the value aspects of the discovery re-

quirements of the mining laws as of the time of the location of oil shale placer mining claims thereon prior to 1920, and as of the present.

2. Whether the Department of the Interior is obliged to apply to the oil shale claims in suit the same rule of discovery for the Green River Formation that it formulated between 1916 and 1920, formally promulgated in 1920, and consistently applied and maintained thereafter until the early 1960's, during which years patents issued for 2,326 oil shale claims aggregating 349,000 acres.

3. Whether the Department of the Interior, having induced private investment in the initiation, purchase and development of oil shale claims and having induced large expenditures to develop commercial technologies for the production of shale oil, by stating that oil shale claims within the Green River Formation could be taken to patent and developed commercially, is now estopped from maintaining that no oil shale claim was ever patentable. (This issue is argued in the petitioner's brief, but was not included in the petition for certiorari or dealt with in the order of the Court granting the petition.)

STATEMENT

In the years 1913-1915 geological field investigations conducted by the Department of the Interior through the United States Geological Survey largely confirmed the vast extent and potentially immensely rich petroleum content of the oil shales of the Green River Formation in northwestern Colorado and adjacent portions of Utah and Wyoming. Early in 1916 the Department through the Oil Board of the Geological Survey studied the technologies then in use in foreign oil shale industries, which dated back to the seventeenth century in some cases, and the economic prospects for

the development of a profitable industry producing shale oil from the Green River Formation and as a consequence of these studies recommended that the oil shale lands be classified as mineral lands, that is, as lands valuable for minerals, so as to preclude alienation under the non-mineral land laws. The Board recommended that despite their mineral value the lands should not, however, be withdrawn from claim location under the mining laws "because it is desired to encourage the development of experimental plants based upon the acquisition of limited areas . . . ," recognizing that "the time when extraction of oil from these shales will become profitable is indefinite and the industry is wholly experimental as far as the United States is concerned. . . ."[1]

In 1916 the Department suggested to the Senate Committee on Public Lands that oil shale be included within the mineral leasing bill then under consideration, noting that as oil "becomes higher in price it will pay to extract from this bituminous shale the oil" and advising that the oil shale lands had not been withdrawn from private appropriation under the mining laws. *See* App. 9-11, Statements of E. C. Finney, of the Board of Appeals, and George Otis Smith, Director of the Geological Survey. At the same time the Department was responding affirmatively to inquiries from members of Congress whose constituents were prepared to make investments in the development of oil shale but before doing so wished to know whether oil shale lands of the Green River Formation were open to claim location under the

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[1] Ex. G-98, Minutes of the meeting of the Oil Board held January 31, 1916, pp. 4-5. References to "Ex." are to exhibits in the record before the Department of the Interior and the courts below. Exhibits prefixed by "G" were offered by the Government and those prefixed by "C" by the claim owners or Contestees, as the respondents were designated in the original administrative proceeding. The Appendix in this Court is cited as "App.", and the Appendix to the petition for certiorari as "Pet. App.".

mining laws. App. 12-13. The areas of the Green River Formation that had been marked out by the Geological Survey were formally classified by the Department on May 23, 1916, "as mineral lands, valuable as a source of petroleum and nitrogen...." App. 14. Implementing the recommendation of the Oil Board, the Department stated that

> "The lands have not been recommended for withdrawal because the oil-shale industry is not yet developed in the United States, and as it is desired to give opportunity for the establishment of experimental plants, it is believed the lands should remain open for the present to acquisition under the mineral land laws...." *Id.*

The lands so classified included the land embraced within the Mountain Boy claims Nos. 6 and 7 and the Harold Shoup claims Nos. 1-4, the six claims at issue here; the lands remain so classified to this day. *See* Ex. G-99.

Later in 1916 oil shale reserves were established for the Navy. This followed from a request by Acting Secretary of the Navy Franklin D. Roosevelt that such reserves be established because "Various official reports of the Interior Department indicate that the petroleum deposits of the United States are being progressively extracted, and at such a rate that it will be a matter of only a few years before it will be necessary to supplement the petroleum yield with oil derived from shale, if the Navy's urgent, extensive and increasing need of the future is to be met." App. 16. Roosevelt urged quick action since substantial opposition to the establishment of the reserves would "be aroused . . . when the value of the oil shale deposits becomes known." *Id.* The Interior Department promptly cooperated, advising that "Two areas have been selected, one in Colorado, and one in Utah, in order to safeguard against the reduction of the reserves through the existence of valid claims not of

record in the Department of the Interior.'"[2] App. 16. The Department also noted that "The unreserved oil shale areas are so greatly in excess of those reserved that the interference with any commercial oil shale industry that may be established will not be serious." App. 16-17.[3]

The Department's Annual Report for the Fiscal Year ending June 30, 1917, advised the public that

> "As a result of the investigations of the western oil shales, it is believed that it is now commercially feasible to work selected deposits of shale in competition with oil from oil wells. . . ."[4]

and that

> "Several commercial plants for mining and treating the shale have been planned and the Bureau of Mines will closely follow the developments." App. 17-19.

These and many similar Government statements both reflected and encouraged private efforts aimed at developing a

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[2] Under traditional procedure the location of a mining claim upon the public domain was accomplished without any filing with or other notification to the Department of the Interior or any other federal agency. State law, which supplemented the federal mining law to the extent not inconsistent with it, required that location certificates be recorded in the local county court.

[3] Interior Department Field Agents reported in 1918 that "We were informed by a representative of the U.S. Geological Survey that it was well known that bona fide oil shale placer locations existed within the confines of this shale reserve at the time it was created but that it was placed wherever it least interfered with bona fide locations. . . ." App. 39-40.

[4] The same view was reached in an extensive retrospective study by the Department of the Interior and offered in evidence in the present litigation. This study indicated that there then existed adequate technology to make a full range of petroleum products from oil shale, and that commercial operations on the mining claims at issue here would have been profitable in the years prior to 1920. App. 122-133; Exs. G-665, G-666. *Accord*, Letter of April 24, 1918, from Director, U.S. Bureau of Mines, to The Haviland-Armstrong Co. App. 37-38.

commercial shale oil industry. *E.g.*, App. 28, 36-38, 133-135, 138-144, 146-148. As private activity increased, the Department continued to stimulate public interest in locating oil shale claims by advising Congress and the public that oil shale lands were available for claim location under the mining laws. Thus, Congressman Edward Taylor of Colorado was told in September 1917 that "the Government has consistently held that the oil shale lands should not be withdrawn, but should be classified as mineral land and made available to the public under the United States mining laws." App. 19-20. Similar views were communicated to R. D. George, the State Geologist of Colorado. App. 21-22.

In hearings on a mineral leasing bill in 1917, Department officials testified that oil could be produced from oil shale for about $2 per barrel. Ex. C-391, *Leasing of Oil Lands, Hearings before the Senate Committee on Public Lands,* 65th Cong., 1st Sess. 250-52 (June 23, 1917). The price of oil was then about $2 per barrel and was rising rapidly. *E.g.*, App. 77, 120. This estimated production cost for oil shale was similar to a number of private estimates[5] including a study performed for Karl C. Schuyler, Jr., in the early 1920's at the time he acquired the Shoup claims Nos. 1-4 which are at issue here. Ex. C-792.

Early in 1918 oil shale mining claimants in Colorado became concerned over reports that lands valuable because they contained oil shale deposits would be included in the new mineral leasing bill and that the Department would not recognize the validity of their unpatented mining claims. In February of that year they obtained a hearing with high Department officials in Washington, which was also attended by a number of Senators and Representatives from Colorado, Utah, and Wyoming. The Department assured

[5] *E.g.*, September 29, 1913, "Preliminary Report of the Oil-Bearing Shales Situated at Grand Valley, Colorado," prepared for the Reed-Midwest Investment Company, Colorado Springs, Colorado, by John C. Sparks, G.Sc., F.C.S., 30 Church Street, New York, Ex. C-220, excerpted at App. 4-9.

the claimants and their legislators that inclusion of oil shale in the leasing bill, which the Department favored because of the mineral value of the oil shale lands, would not adversely affect previously initiated oil shale mining claims. As a protection to the oil shale claimants, the Department indicated that an explicit savings clause would be prepared. This was done, and the product with slight change became the "savings clause" in Section 37 of the Mineral Leasing Act of 1920.[6] App. 71-78, 25-37.

Department officials and Congressman Taylor asked the mining claimants to present to the House Committee on Public Lands the same report about development efforts that had been provided at the Interior Department hearing. App. 25-26, 71-76. The requested presentation was made at a hearing on February 26, 1918. The principal speaker at the 1918 hearings for the oil shale claimants, State Geologist Russell D. George of Colorado, testified that there were reasonable prospects for commercial success, but that success was by no means assured.[7] Near the end of the presentation by the oil shale claim owners, Congressman Taylor observed that in light of his communications with the Interior Department, he believed that if the

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[6] Section 37 provided that deposits of coal, phosphate, sodium, oil, oil shale and gas "in lands valuable for such minerals" should thenceforth be subject to disposition only as provided in the Act (that is, by lease) "except as to valid claims existent at the date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." The full text of Section 37 is quoted at pages 3-4 of the petitioner's brief.

[7] "I believe it is going to be possible to make a commercial success of it if plants of the size I have spoken of are installed and if absolutely correct scientific management is used. We can not claim any get-rich-quick game at all; that is utterly impossible. I am saying 'we.' I have not any financial interest in it whatsoever. I do not own a claim; I do not own a share of stock; and I have refrained from taking any financial interest because I wanted to be in a position to speak as I am speaking to-day in regard to this industry—for the people, for the State, and I believe for the Nation." App. 31.

savings clause provision were "put in this bill it will be scrupulously recognized and enforced, and all those people who strictly comply with the law will get a patent. . . ." App. 37. Following these hearings, the Committee reported out amendments to the mineral leasing bill, which for the first time included "oil shale" among the minerals to be available thereafter only through leasing and, also for the first time, included a "savings clause," then Section 28 of the bill. *E.g.*, App. 71-77, 25-37; 56 Cong. Rec. 7033-7035 (May 24, 1918); 56 Cong. Rec. 7104-7107 (May 25, 1918).

Interior Department officials advised the oil shale claim representatives that it would not be necessary for them to repeat their testimony before the Senate Public Lands Committee. App. 76. This proved to be accurate. The House amended the bill passed by the Senate, S. 2812, to provide for leasing of lands containing valuable deposits of "oil shale" and to add a savings clause, 56 Cong. Rec. 7033 (May 24, 1918); 56 Cong. Rec. 7104-05 (May 25, 1918); H. Rep. No. 563, 65th Cong., 2d Sess. 17-18 (May 14, 1918); and the amended bill then passed the House and was accepted in conference by the Senate early in 1919. H. Conf. Rep. No. 1059, 65th Cong., 3rd Sess. 10, 15 (Feb. 11, 1919); S. Conf. Rep. on S. 2812, Doc. No. 392, 65th Cong., 3rd Sess. (Feb. 13, 1919). In fact, the House and Senate Committees had both agreed on the addition of "oil shale" and the savings clause before the House passed S. 2812. Representative Raker of the House Committee advised the House:

> "This provision, particularly lines 6 to 12, with the addition of the words "oil shales," has been one of the special provisions in the bill that has been given more careful consideration by the committee, and especially by a subcommittee consisting of Senator LENROOT and myself, who spent much time on it. . . . The purpose was to protect those who had valid claims." 56 Cong. Rec. 7105 (May 25, 1918).

Although twice reported out of conference (see H. Rep. No. 1138, 65th Cong., 3rd Sess., Feb. 25, 1919), the bill failed of enactment due to the press of business in the Senate at the end of the session. Essentially the same bill was introduced later in 1919 in the next Congress, and with little further debate (not material here) became the Mineral Leasing Act of 1920, ch. 85, 41 Stat. 437, 30 U.S.C. 181 *et seq.*[8] As Representative Sinnott, Chairman of the House Conference Committee, summarized for the House on February 10, 1920:

> "[T]he bill is practically the same as it passed the House last October. It is also modeled on the bill that passed the House at the last session and the session before and the session before.
>
> "In brief, the bill does away with and repeals the present laws providing for the patenting and the absolute disposal by the Government of the mineral resources named in the bill. This bill is strictly a leasing bill. No longer can patents be issued deeding away these mineral resources of the Government, except as to some valid claims now existing upon mineral lands provided for in section 37 of the bill. But *apart from that,* no longer will . . . oil shale . . . be deeded away by the Government."[9] (Emphasis supplied.)

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[8] S. 2775, the bill that became the Mineral Leasing Act of 1920, as introduced on August 15, 1919, contained the oil shale and savings clause provisions. 58 Cong. Rec. 3886, 4056-57. The Senate passed the bill on September 3, 1919 (58 Cong. Rec. 4789), the House amended and passed it on October 30 (*id.* at 7780-81), differences were resolved in conference (see H. Conf. Rep. No. 600, 66th Cong., 2d Sess., Feb. 6, 1920), both houses passsed the bill soon thereafter, and it was signed into law on February 25, 1920.

[9] 59 Cong. Rec. 2709. The House report on S. 2775, No. 398, p. 16 (Oct. 21, 1919), explained that "Section 21 contains the provision with relation to oil shale, and is substantially the same as the Senate draft and last year's conference draft."

Shortly following enactment of the Mineral Leasing Act of 1920, the first application to patent oil shale mining claims reached Department officials in Washington, and the importance of the question and the precedential consequence of the answer to it led to its decision at the Secretarial echelon. The answer was given in the *Instructions* of May 10, 1920, "Act of February 25, 1920—Oil Shale Placer Claims," published at 47 L.D. 548. App. 49-54. These *Instructions* constituted the Department of Interior's formal statement, in the form characteristically employed for the promulgation and recording of such decisions, that claims located for oil shale in the Green River Formation were eligible for patent. The *Instructions* reviewed the history of commercial exploitation of oil shale elsewhere in the world, the current activity in the western oil shale regions, the consistent views previously expressed by the Department in response to inquiries about the locatability of oil shale claims, the 1916 classification, establishment of the Naval Oil Shale Reserves, and the savings clause of the Mineral Leasing Act of 1920 and concluded that

> "Oil shale having thus been recognized by the Department and by Congress as a mineral deposit and a source of petroleum, and having been demonstrated elsewhere to be a mineral of economic importance, lands valuable on account thereof must be held to have been subject to valid location and appropriation under the placer mining laws. . . ." App. 54.

Patent was accordingly issued. These *Instructions,* issued by First Assistant Secretary Vogelsang, were reinforced by Secretary Payne, who on August 5, 1920, wrote to Senator Phipps that the Department's legal force had been unanimously of the view that the *Instructions* were "the only conclusion that could be reached under the law and the facts" and that no reasons had been presented which warranted a contrary view. App. 56.

It is conceded by the Department that the claims in suit here are not distinguishable, in respect to the richness and quantity of their oil shale content, from the La Paz claims patented as a consequence of the 1920 *Instructions.*[10]

Over the next decade, the *Instructions* were followed in the patenting of 1,177 mining claims, aggregating a total of 184,000 acres (App. 83-84; Exs. C-190 and G-104 (tabulations of patenting)) and in a consistent series of departmental decisions, *e.g., Smallhorn Oil Shale Refining Co.,* 52 L.D. 329, 331 (1928) ("... the Department has long held that lands classified as valuable for oil shale as a source of petroleum and nitrogen were prior to the passage of the leasing act open to mineral entry under the mining laws ..."); *Standard Shales Products Co.,* 52 L.D. 522, 523, 527 (1928) ("Timely discovery being sufficiently shown in the patent application ... the mineral entry should be clear-listed and patent should issue. ..."); *Instructions, Location of Oil Shale Placer Claims,* 52 L.D. 631, 633 (1929).

The only attempt to depart from the 1920 *Instructions* was a short-lived effort in the mid-1920's by some field officials to apply the view that a claim not containing an actual surface exposure of oil shale which was itself sufficiently rich in oil yield to satisfy the criteria of the Geological Survey for classification as mineral lands should be regarded as invalid even though it was known that extensive and rich deposits of oil shale, more than sufficient to satisfy the classification criteria, underlay the surface. This question was raised and settled at the Secretarial echelon in favor of the oil shale claimant in *Freeman* v. *Summers, United States, Intervener* (*On Rehearing*), 52 L.D.

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[10] The claims in suit and the La Paz claims both lie at the southern perimeter of the oil shale escarpment on the north bank of the Colorado River. Department geologists testified below that the oil shale strata exposed in the La Paz claims and in the claims in suit are lateral extensions of the same deposit. Tr. 505, 509; see also Ex. C-885, p. 1.

201 (1927), App. 59-67; the result was adherence to the practice under the *Instructions*.[11]

As the Director of the Bureau of Land Management advised in 1957, "The Department concluded on May 10, 1920 (47 L.D. 543) that oil shale is a valuable mineral subject to location and entry under the mining law. These 'Instructions' have never been overruled or vacated and they bind the Bureau until they have been." App. 120.

In the fall of 1930, a disgruntled Interior field official, Ralph Kelley, published a series of articles in the *New York World* charging high Department officials with improper administration of the mining laws with respect to Green River Formation oil shale claims, focusing in particular on the *Freeman* v. *Summers* case. These charges led to a prompt suspension of patenting by order of Secretary Wilbur, an investigation and report by Assistant Attorney General Seth Richardson, a lengthy investigation by the Senate Committee on Public Lands led by Senator Walsh of Montana, of Teapot Dome fame, and the consideration of amendatory or remedial legislation by the House Public Lands Committee.[12] All three inquiries evidenced a

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[11] The *Instructions* had been applied on several occasions between 1920 and 1927 in recognition of the sufficiency of "lean" exposures where substantial oil shale deposits were known to lie beneath the surface. *See, e.g.,* Exs. C-119, pp. 5, 6, 11, 12; C-117, p. 8; C-110, pp. 5-6; C-113, p. 23; C-190 (showing patenting of the claims described in the other cited exhibits).

[12] Kelley's articles appear in Ex. G-729, *Hearings Before the Senate Committee on Public Lands and Surveys on S. Res. 379 Authorizing the Committee To Inquire into the Charges Made by a Former Government Employee in Relation to the Disposition and Alienation of Oil Shale Lands of the United States"*, 71st Cong., 3rd Sess. (Jan. 31-Feb. 27, 1931) (hereinafter cited as *1931 Senate Hearings*); *see also* Ex. C-321, Report by Assistant Attorney General Seth Richardson; Ex. C-320, *Consolidated Hearings Before the House Committee on the Public Lands, Applications for Patent on Oil-Shale Lands,* 71st Cong., 2d and 3rd Sess., Parts 1, 2 and 3 (1930-1931).

thorough understanding of the Department's practices in issuing oil shale patents. Richardson concluded that *Freeman* v. *Summers* was at most "fairly debatable" and that "the oil shale lands of the United States are being vigorously and honestly administered by Secretary Wilbur and his Department." Ex. C-321, pp. 54, 167; App. 69-71.

On November 6, 1930, Secretary Wilbur wrote to both Public Lands Committees advising that the current assessment work controversy was "only part of the general problem as to oil shale lands and it may be that other phases of it not now covered by legislation, such as the question of discovery . . . will impress you as requiring legislative definition." App. 71.

Ralph Kelley testified before both Committees. So also did Secretary Wilbur, who indicated that absent congressional direction to the contrary, the Department would continue to issue patents for oil shale claims that contained deposits of the Green River Formation. *1931 Senate Hearings* 213-215, 341. The House hearings resulted in a Committee report which, although taking note of the Secretary's invitation to consider definition of questions of discovery, recommended minor modifications of the mining laws, including a requirement that patent applications for oil shale claims be filed by July 1, 1934, but with no change in discovery requirements or interpretations. H.R. Rep. No. 2537, 71st Cong., 3rd Sess., to accompany amended H.R. 15002, "Bill Concerning Oil Shale Lands" (Feb. 6, 1931) (Ex. C-380). The Committee concluded that such legislation

> "clarifies the controversial points in a spirit which is fair to the Government, and at the same time respects every existing valid right now held by any individual claimant. It defines a policy for the guidance of the Department of the Interior, and creates two new requirements not heretofore found in the mining laws, but which appear to be necessary, proper, and advisable for the final disposition of the questions affecting

> oil shale lands, only. These changes do not apply to any other class of public lands." App. 81.

At the outset of the Senate hearings, Secretary Wilbur urged a very thorough investigation, stating "We propose to see this through to the very last case. . . . Certain charges have been filed. . . . They have been of a certain character and now that the Senate has started in on this we feel that we should have clearance in the Senate," to which Senator Walsh replied "Absolutely." App. 89. The Committee did conduct a thorough hearing into the Department's administration of the mining laws with respect to oil shale claims, and into Kelley's charges. E. C. Finney testified for the Department that because of a then surplus of oil, oil shale could not have been sold at a profit in 1927 or 1930. Ex. G-729, pp. 22-23. The Committee volunteered no criticism of what the Department had done and issued no recommendation for any change. Following the hearings, Secretary Wilbur made inquiry of the Committee, and on April 18, 1931, was told by the Chairman, Senator Nye, that

> "I have conferred with Senator Walsh and beg to advise that there is no reason why your Department should not proceed to final disposition of the pending application for patents to oil shale lands in conformity with the law." App. 103.

The Department thereupon resumed processing pending oil shale patent applications. Those applications and others filed thereafter resulted in the issuance of patents for 1,149 oil shale claims between 1931 and 1960, when the present controversy arose. Exs. C-190; G-104.

In the late 1930's and early 1940's, Congress was reminded of the patentability of oil shale mining claims by Department efforts to obtain legislation to overthrow this Court's decision in *Ickes* v. *Virginia-Colorado Development*

Corp., 295 U.S. 639 (1935), which was then interpreted as giving the Department no right to attack oil shale claims for nonperformance of annual work. App. 104-113. In endorsing such legislation the Department "emphasized that valid existing claims may be maintained, unaffected by the proposed bill. . . . The proposed legislation is not retroactive. . . ." App. 106-107.

The patenting of oil shale claims continued after World War II, but difficulties developed in the practicalities of obtaining patent that led to the adoption of remedial legislation in 1956 to facilitate the issuance of oil shale patents. Because the oil shale lands had been classified by Interior as valuable mineral lands in 1916, the minerals in them could not be acquired by homesteaders under the agricultural land laws, but this did not preclude the patenting of the surface to homesteaders. This was true where a valid but unpatented oil shale mining claim existed. *E.g.*, *James W. Bell*, 52 L.D. 197 (1927); *Brennan* v. *Udall*, 251 F.Supp. 12 (D. Colo. 1966), *aff'd*, 379 F.2d 803 (10th Cir.), *cert. denied*, 389 U.S. 975 (1967). If, subsequent to the issuance of a surface patent, an oil shale claimant sought patent, it was Department practice to insist that the oil shale claimant first obtain the reconveyance to the United States of the surface patent, on the theory that Congress had only authorized the Department to issue a mineral patent if it also embraced surface interests, not a patent for the minerals only.

This procedure worked well enough where the surface owner was cooperative, for it was customary in that case that the issuance of a complete patent by the United States to the oil shale claimant was followed by the mining claimant's reconveyance of the surface back to the former surface owner. But where the surface owner would not cooperate, the oil shale claimant was stymied and issuance of a patent to him under the Department policy was blocked. To deal with this impasse, Congress in 1956 authorized the Department to issue a patent for the mineral

estate alone. Act of July 20, 1956, 70 Stat. 592, 30 U.S.C. 122. This legislation was sponsored by Representative Wayne Aspinall, whose western Colorado congressional district included the principal oil shale deposits of the Green River Formation, and, while general in terms, was well understood to have been enacted to deal with the patenting of oil shale public land. The legislation was endorsed by the Department of the Interior, which advised Congress that the legislation "concerns valid and subsisting rights acquired by discovery and location under the mining laws made prior to the enactment of the Mineral Leasing Act. . . ." App. 115-119.

History of the Mountain Boy and Shoup Claims. The Mountain Boy Nos. 6 and 7 and the Harold Shoup Nos. 1, 2, 3, and 4 are contiguous claims of approximately 160 acres each near the southern border of the oil shale deposits in Colorado on the north bank of the Colorado River. An escarpment cuts across each of these claims exposing several hundred feet of oil shale. The claims contain at least 500 continuous vertical feet of oil shale that will yield an average of 15 gallons of oil per ton of rock, or approximately 96 million barrels of oil per 160 acre claim. App. 137. Included within this deposit are about 50 continuous vertical feet that will yield an average of 30 gallons of oil per ton (App. 135), the equivalent of 16 million barrels of oil per 160 acre claim.[13] The lands within the claims have only nominal value as grazing land, on the mesa above the escarpment, and virtually no value for agriculture or any other purpose. App. 121. The climate is arid or semi-arid. *Ibid.*

The claims were located by groups of local residents in 1917 and 1918. The Mountain Boy claims were purchased

[13] As the court of appeals observed, "the Government in these proceedings has acknowledged that these claims met the discovery requirements under the 1916 to 1920 standards applied by the Department. . . . The geology was obviously well known, uncomplicated, and the beds were conspicuous." Pet. App. 5a.

in 1920 by a "business trust" formed by individuals of modest means who together contributed $25,000 in 1920, and additional sums over the next decade, for annual assessment work, which was performed each year, and for the preparation and prosecution of an application for patent, which was filed in 1924.[14] The application was followed by extensive and protracted investigations and adjudications, including decisions in the 1930's that Mountain Boy Nos. 6 and 7 were valid and eligible for patent (*e.g.*, App. 57), but that other claims covered by the application were invalid. Efforts to effect an exchange of lands so as to obtain a contiguous block of patented land proved unsuccessful. During this period ownership of the claims shifted, interested persons died or went into the armed services, and the state of title became confused. In 1945 Interior rejected the application "without prejudice" on the ground that it was not then being vigorously pursued. Ex. C-311-RR; see generally Ex. C-311.

Thereafter Shell Oil Company acquired interests in the claims and caused a second patent application to be filed in 1958, in reliance, among other things, upon Interior's prior determination that the Mountain Boy Nos. 6 and 7 claims were valid. *E.g.*, Exs. C-744; C-745; G-508; G-510. Interior officials in Colorado investigated the claims again and recommended that patent should issue. In 1961 they forwarded the application to Washington for review and preparation of the patent. Exs. C-727; C-756; Tr. 1315-1316. It was at that point that Interior decided that no further oil shale claims would be patented.

The Harold Shoup Nos. 1-4 claims were purchased in the early 1920's by Carl C. Schuyler, Sr., a lawyer in Colorado

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[14] The petitioner's brief errs in stating (p. 58) that "for over 40 years, no patent was sought on respondents' claims." The brief also argues that the supposed inaction reflected the owners' views that the claims were not valuable. *Id.* at n. 31. There is no evidence for that contention and the fact is that the claim owners vigorously, and to the limit of their resources, sought patent and resisted Departmental attacks upon their claims.

who was active in a number of natural resources development projects. He performed annual work on the claims but did not at once apply for patent, concentrating his resources on efforts to develop commercial technology. On the basis of excellent technical recommendations and a market analysis showing that a profit could be made if the price of oil remained over $1.75 per barrel, he began construction in 1920-21 of an oil shale production plant on other unpatented claims in the general vicinity of the Mountain Boy and Shoup claims. However, a fatal accident in the course of construction led to prolonged litigation which, combined with a drastic decline in oil prices, resulted in 1928 in termination of the effort. Exs. C-965; C-971; C-972; C-125.

In that same year 1928 the Shoup claims became an object of a general campaign then being conducted by Interior to determine the validity or invalidity of all oil shale mining claims. This resulted in a thorough field investigation and protracted litigation which terminated in 1935, in favor of the claims. See Exs. C-313; C-874, pp. 47-48. By that time, Schuyler had died and left the claims in trust for the benefit of his family. This trust terminated in 1958, at which time the family formed D. A. Shale, Inc., transferred the claims to it, and caused a patent application to be filed in 1960. Ex. C-971; C-315; G-27; G-28. The application was being processed in Colorado when in 1961 officials in Washington decided to contest all oil shale mining claims for alleged lack of value.

SUMMARY OF ARGUMENT

I

The policy by which the Department of Interior administered the oil shale lands of Western Colorado, prior to its reversal of policy in 1961, accurately reflected the congressional view that oil shale was a valuable mineral capable

of claim location and patent under the mining laws which governed the question prior to enactment of the Mineral Leasing Act of 1920. In the savings clause of Section 37 of that Act Congress directed that that prior law should continue to govern pre-existing valid oil shale claims, and did so in the belief that such valid claims existed.

This congressional understanding was developed over a considerable period of several years prior to 1920, in major part on the basis of representations to the Congress by the Department of the Interior and of congressional reaction to them. Beginning as early as 1913 with investigations by the United States Geological Survey the Department had formulated an affirmative view as to the value and economic significance of the oil shale deposits, reflected in public utterances and publications to that effect, in the classification of oil shale lands (including the lands at issue in this suit) as valuable mineral lands in 1916, in the establishment of Naval Oil Shale Reserves, also in 1916, and in the Department's recommendation to the Congress that because of their value the oil shale lands should be included in the mineral leasing legislation then being considered. The enactment of the Mineral Leasing Act with its savings clause conclusively shows congressional acceptance of these views.

The Department's *Instructions* of May 10, 1920, which formalized the eligibility of oil shale claims for patent under the savings clause of the Mineral Leasing Act of 1920, and the issuance of patent for hundreds of oil shale claims thereafter were thus a consistent and predictable reflection both of the congressional intention manifest in the inclusion of oil shale in the Act and in enactment of the savings clause and also of the Department's well-developed and previously expressed position that oil shale claims could be located under the placer mining law.

The Department decision in *Freeman* v. *Summers,* 52 L.D. 201 (1927), affirming the patentability of oil shale

claims, was thus not an aberration but a consistent reflection of prior Department policy consistent with the congressionally-mandated legislative framework. That that conclusion is correct is underscored by the extensive investigations of Department practice with respect to oil shale which were conducted by both houses of Congress and the Department of Justice in 1930-31, in response to charges of malfeasance that sought to invoke the public suspicion so recently and justifiably aroused in the Teapot Dome scandal. The circumstances in which the Department's practices were reviewed thus lent added weight to the conclusions expressed that the Department's continuing recognition of the value and patentability of oil shale claims properly reflected the law and should not be changed.

On a number of occasions subsequent to 1930, Congress has amended the mining laws in various respects of particular significance for Green River Formation oil shale mining claims. These amendments included various suspensions during the 1930's of the requirement that annual work be done on claims, a matter which at that time was of substantial significance only for oil shale mining claims. Then, in 1956, Congress enacted legislation for the specific purpose of facilitating the patenting of oil shale mining claims in circumstances where a surface patent had been issued and remained outstanding. With the Department's support and recommendation, Congress clearly expressed the understanding that there were, and continued to be, pre-Leasing Act oil shale mining claims that satisfied the discovery requirements of the mining laws. As is the case with the Mineral Leasing Act, the 1956 legislation would have been entirely pointless if, as petitioner urges, there never was a valid oil shale mining claim. The court of appeals thus quite properly held that the Department's long-established practice of regarding oil shale mining claims as eligible for patent reflected the specific understanding and intent of the Congres and that such intent was controlling.

II

As an independent ground for affirmance of the decision below, the claims in suit should be held valid because both at the time of location in 1916-1917 and at the time of patent application and contest in these proceedings the oil shale deposits within the claims constituted "valuable mineral deposits" within the traditional standards of the mining laws. The Department's own evidence at the hearing in this case establishes that the claims have always been valuable, in an economic sense, because of their oil shale deposits and that a commercial-scale operation on the claims in suit, both at the time of location and at the time of patent application, would have yielded a profit. The Department should not be allowed to evade the consequence of these admissions. This is no occasion for the sometimes appropriate concern that the mining laws are being used to obtain lands for non-mineral purposes: the lands within the claims in suit have substantially no non-mineral values, and the Department has not contended that the respondents seek patent on the lands because of non-mineral values or for non-mineral uses.

The classic test, often approved by this Court, defines "value" under the mining laws in terms of reasonable prospects for success in developing a paying mine. The circumstances at the time of location, and at present, clearly justify such expectations. Prior to 1920 the Department itself gave widespread publicity to the mineral richness and economic prospects of the oil shale deposits, which was reinforced by the objective economic factors of that era (and this one) and by the existence elsewhere of commercially successful oil shale industries operating on reserves less rich than those of the Green River Formation. The actions of the Department in classifying the lands in suit as valuable mineral lands in 1916 and in reserving oil shale under 1914 Act patents are consistent only with the

view that the Department itself recognized that the oil shale lands met the mining law requirement of value.

III

The Department's position is that it may repudiate with retroactive effect an administrative rule formalized in 1920 and consistently followed and applied for forty years thereafter with congressional knowledge and acquiescence that oil shale of the Green River Formation was a valuable mineral capable of claim location and patent. A second independent ground for affirmance is that such an administrative *ipse dixit* cannot be allowed to stand. The rule was clearly a permissible construction of the mining law and reflected congressional understanding. The authorities are legion that retroactive repudiation of a long-standing administrative rule is repugnant to profound values entitled to protection. The Department urges in support of its turnabout no more than that its 40 years of prior practice reflected a legal "error," which is wholly insufficient as a basis for the action sought to be defended by the petitioner.

This is not a case where the administrative practice sought to be abandoned has an insubstantial basis or an infrequent application. The rule was developed over the period 1916-1920 in conjunction with the developing consensus in Congress which resulted in the inclusion in the Mineral Leasing Act of lands "valuable" by reason of their oil shale and in the adoption of the savings clause as to previously located claims. The rule was formally promulgated in 1920, applied in the issuance of more than 2,000 patents, in the adjudication of government and private contests and in subsequent rule-making, and was subjected to intensive scrutiny by the Department of Justice and by both houses of Congress in the aftermath of the Kelley charges of corruption and irregularity, and was left unchanged.

IV

As a third independent ground for affirmance, the district court correctly held that the Department was estopped from challenging the claims in suit for lack of value. The Department itself clearly held out both the prospect of profit in commercial operation and the assurance of patent for claims otherwise in compliance with the law and thereby induced effort, investment and reliance. These Department actions and statements were taken and made by the highest officers of the Department acting in the scope of their duties, and were intended to induce the reliance that in fact followed upon them. The circumstances of this case fall well within the bounds of the modern doctrine which holds that the government is subject to the doctrine of equitable estoppel for the authorized acts of its agents within the scope of their duties.

ARGUMENT

I. THE INTERIOR DEPARTMENT'S CONSISTENT RECOGNITION THAT OIL SHALE OF THE GREEN RIVER FORMATION WAS A VALUABLE MINERAL UNDER THE MINING LAWS AND THE SAVINGS CLAUSE OF THE MINERAL LEASING ACT WAS A CONCLUSION ACCEPTED BY CONGRESS IN THE ENACTMENT OF THE MINERAL LEASING ACT, IN ITS REVIEW IN 1930-31 OF THE DEPARTMENT'S PATENTING OF OIL SHALE CLAIMS, AND IN THE ENACTMENT IN 1956 OF LEGISLATION TO FACILITATE OIL SHALE PATENTING.

The theory of the petitioner's case is that the long-standing practice of the Interior Department in recognizing oil shale of the Green River Formation as a valuable mineral deposit within the mining laws was an aberration of which Congress was never effectively made aware and as to which the congressional response has never been more unambiguous than silence. That case is wholly at

war with history. The fact is that the Department's recognition of oil shale value developed in tandem with a congressional appreciation of the same fact, a consensus which is explicit in the legislative history of the Mineral Leasing Act of 1920. The petitioner hardly deals with that legislative history.

The explicit congressional acceptance of oil shale value in 1920 was underscored and confirmed by the thorough investigation conducted by both houses of Congress in 1930-31 in response to charges that precisely focused on the issue which the petitioner would have the Court believe is now a question of first impression: the allegation that the Department was improperly patenting oil shale claims and, in particular, that its standard for discovery on oil shale claims was unauthorized. These charges were reviewed in detail and while remedial legislation on other points was proposed, none was on discovery issues, and the Department was advised by the congressional leaders that it might resume its patenting practice.

The third significant occasion for congressional consideration was the enactment in 1956 of legislation for the precise purpose of *facilitating* the obtaining of patent to oil shale claims.

A. In including "oil shale" within the Mineral Leasing Act and the savings clause therein, Congress expressed its intent that previously located oil shale mining claims, properly initiated upon lands containing substantial deposits of the Green River Formation oil shales, satisfied the discovery requirements of the mining laws.

The basic premise of the general mining statutes enacted by Congress in the years 1866 to 1872 was that the national interest would be served by transferring ownership of valuable mineral deposits in the public domain to the person first discovering them, thus providing a sub-

stantial inducement for the finding of minerals and the resulting benefits to society in their exploitation. This legislation in essence ratified the practices of miners that had grown up during and following the Gold Rush (*see, e.g., Jackson* v. *Roby,* 109 U.S. 440, 441-442 (1883); *Smelting Co.* v. *Kemp,* 104 U.S. 636, 650 (1882); *Jennison* v. *Kirk,* 98 U.S. 453, 457-458 (1879)), and was at variance with prior federal efforts to make mineral lands available only by leasing. *See* P. Gates & R. Swanson, History of Public Land Law Development 699-723 (1968). Substantial objections to this philosophy arose around the turn of the century, however, when the presence of valuable deposits of minerals, particularly oil, became known prior to the initiation of mining claims.[15] Such knowledge was developed by and large in two ways. One was the successful completion of exploration (for example, the drilling of one or more oil wells) on an unpatented mining claim in geologic circumstances which indicated the certainty or at least the very high probability that the mineral also underlay adjacent areas not yet covered by mining claims. The other way in which such knowledge was developed was through the field explorations and published reports of the United States Geological Survey concerning the geographic extent and richness of various minerals, including phosphate, sodium, and, in the period beginning in 1913, the oil shale of the Green River Formation.

The general response of the Executive Branch to the development of such knowledge was to withdraw the lands known to be valuable for minerals from location under the mining laws, and to do so by executive action. Substantial controversy arose as to the propriety of such executive action, but in 1915 this Court upheld the withdrawals.

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[15] The petitioner's brief notes, p. 26, that Congress became "dissatisfied with the general mining law as it applied to oil and certain other minerals," but neglects to note the obvious reason: that the minerals were too valuable, were known to exist, and should be retained by the Government.

United States v. *Midwest Oil Co.*, 236 U.S. 459 (1915). While an executive withdrawal could thus preclude utilization of a particular mineral deposit pursuant to the mining laws, it did not and could not provide any alternate means of development. To reach a congressional consensus on an alternate required virtually all of the years of the two Wilson Administrations, during which successive Congresses conducted extensive hearings on various leasing proposals, a process that culminated in enactment of the Mineral Leasing Act of 1920. See pp. 7-10, *supra*. This consensus, of course, had to be acceptable not only to the Congress but also to the Executive Branch, in which the Departments of Justice, Interior, and Navy played large roles.

It was in this context that such a consensus was reached with respect to the oil shales of the Green River Formation. From the standpoint of the Department of the Interior, it is significant that the Department itself had concluded in 1916 that the oil shales were valuable mineral lands and had so classified them. The basis for the classification was the conviction that sooner or later the oil yield potential of the Green River Formation would be of commercial importance to the nation. *E.g.*, App. 9-11, 13-14.

Classification was a definitive statement by the Department that the lands involved were valuable within the meaning of the mining laws. The basic purpose of classification, such as the 1916 classification of oil shale, was to determine whether lands should be disposed of under the agricultural land laws or the mining laws.[16] As the Department had ruled in *Samuel D. Pulford, et al.*, 45 L.D. 494

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[16] It was the contemporaneous view of the Geological Survey that in classifying lands pursuant to its organic Act of March 3, 1879, 20 Stat. 377, 394, 43 U.S.C. 31(a), it was to carry out "the plain intention of Congress that the public lands shall be classified and that they shall be disposed of in accordance with their classification." U.S.G.S. Bulletin 537, *The Classification of Public Lands* 20 (1913); Ex. C-996.

(1916), the classification of lands containing coal as mineral lands was proper only if the lands contained coal "of such quality and in such quantity as reasonably to warrant the conclusion that they are capable of being profitably mined or worked. . . ."[17] Also pertinent is the contemporaneous summary:

> ". . . public lands . . . are of but two classes, mineral lands and non-mineral lands. In the west, the former can be legally entered under only the mineral land laws; the latter under only the non-mineral or what may be broadly termed the agricultural land laws." *United States v. Kostelak,* 207 Fed. 447, 450 (D. Mont. 1913).

Accord, Diamond Coal & Coke Co. v. *United States,* 233 U.S. 236, 239-40 (1914); *Davis's Administrator* v. *Weibbold,* 139 U.S. 507, 519, 523-24 (1891); *United States* v. *Clare Williamson,* 75 I.D. 338, 344 (1968).[18] To the same effect is

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[17] Classification as mineral lands was not conclusive vis-a-vis members of the public. As *Pulford* suggests, one who disagreed with a classification had the burden of showing that the lands were not valuable for minerals. *See, e.g.,* App. 53-54. It was the fact of mineral value, rather than classification, which was truly determinative of whether the lands could be disposed of under the agricultural laws rather than the mining laws. Until the classification was changed, however, it was binding upon the Department and served to guard against inadvertent issuance of homestead patents by the General Land Office. It was for this reason that the 1916 classification of Green River Formation oil shales was noted on the tract books of the local land offices. App. 13-15. On its own initiative the Department from time to time amended the 1916 classification, when further studies showed that certain lands contained "insufficient mineral value to warrant this classification . . . ." App. 43.

[18] The Mineral Leasing Act of 1920 has been construed as having created a third category of lands—those which are not presently valuable for minerals, but are valuable enough for prospecting so as not to be appropriate for agricultural entry. *See, e.g., Blakeney* v. *Womack,* 51 L.D. 622, 624 (1926). This construction is derived from the Act's then novel provision for prospecting permits for certain minerals. The Act did not provide for prospecting permits for oil shale, no doubt in reflection of congressional understanding that the lands containing oil shale had already been defined and that prospecting was therefore unnecessary.

this Court's observation in *Burke* v. *Southern Pac. R. R.*, 234 U.S. 669, 677 (1914) that:

> "In the legislation of Congress, the term 'mineral lands' is not confined to railroad grants. It occurs in the mining laws, in an excepting clause in the homestead law, and in like clauses in other public land laws. *Evidently it has the same meaning in all.*" (Emphasis supplied.)[19]

The 1916 classifications thus amounted to a formal declaration by the Department that the classified lands were valuable within the meaning of the mining laws. This view was expressed contemporaneously in internal Department communications and also in statements to members of Congress and the general public. *E.g.*, App. 13-15, 19-22, 25 ("Large areas . . . have been classified . . . as mineral land valuable for oil shale.")

In making the 1916 oil shale classifications, the Department deliberately chose not to follow the then conventional practice of withdrawing valuable mineral lands from entry under the mining laws. It did so for the stated purpose of inducing private efforts to develop an oil shale industry. *E.g.*, App. 14. Consistent with the tenor of the times, Interior's practical judgment was that the development of a commercial shale oil industry would be in the national interest, that the private sector should be counted upon to develop that industry, but that the private sector would not

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[19] The petitioner's brief erroneously suggests, p. 19, n. 5, a difference between the value required for discovery to perfect a mining claim and the value required for classification as mineral land. There is no difference in value, and the Department explicitly stated that the 1916 classification evidenced "the value of the lands so classified for mining purposes." App. 53-54. The difference between the two lies in the fact that for discovery an actual physical finding of minerals is required, as distinct from knowledge that lands are underlain by valuable minerals. *See, e.g., Diamond Coal and Coke Co.* v. *United States*, 233 U.S. 236 (1914); App. 102 (Ex. C-157).

be willing to undertake the cost and effort of development unless it could obtain under the mining laws oil shale reserves sufficient, when commercially exploited, to justify the development effort. Interior recognized that supply and demand conditions and the existence of successful oil shale industries abroad gave reasonable prospects of the development here of a commercial domestic oil shale industry, but also that such development was indefinite and uncertain. It is not without its irony that the Department now contends that this very uncertainty should have had the effect of denying the status of "valuable" to the oil shale of the Green River Formation. The Department's contemporaneous view, however, was that the Green River Formation oil shales met the classic test of value under the mining laws.

It was thus altogether expectable that when in 1918 oil shale claim owners became concerned about the effects of possible inclusion of oil shale lands within the mineral leasing bill upon the patentability of their claims (App. 28), the Department would take the position that oil shale claims initiated prior to the effective date of the leasing act would continue to be eligible for patent. Further, one may surmise that when, in February 1918, the oil shale claim owners obtained a hearing with the Department on this matter, the Department was pleased to learn that a potentially significant source of opposition to the leasing bill (the oil shale claimants and the Colorado, Utah, and Wyoming delegations represented at the Interior Department hearing, *e.g.*, App. 76), would be satisfied by the Department's assurances, which were then given, that existing oil shale mining claims would be respected and would continue to be eligible for patent.

The Department was represented at the 1918 hearing by a number of senior officials, including First Assistant Secretary Vogelsang, E. C. Finney, the Department's chief law officer, Dr. George Otis Smith, Director of the Geological

Survey, Dr. Van H. Manning, Director of the Bureau of Mines, and Clay Tallman, Commissioner of the General Land Office. App. 72. The meeting explored whether oil shale mining claims would be regarded as patentable and what the Department's attitude was toward private efforts to develop a shale oil industry. The Department exhibited "a very friendly interest in the development of the shale." App. 73. The Department also indicated that it would recognize the validity of prior claims, and it was agreed that Mr. Finney and attorneys for the claimants would together draft a savings clause "that would except these claims from the operation of the leasing law." App. 71-74, 76-77, 105-106.

At the urging of Department officials and the congressional delegations, essentially the same presentation that had been made to the Department was made a few days later at the House hearings. *Hearings Before the House Committee on the Public Lands, Oil Leasing Lands,* February 26, 1918, 65th Cong. 2d Sess., excerpted in Ex. G-384; App. 25-37, 76. The chief spokesman for the oil shale claimants at the House hearing was Colorado State Geologist Prof. R. D. George. He noted at the outset that the presentation being made had been made at the Department some days previously and that the Department had requested the claimants to make the same presentation to the Committee. App. 26. He emphasized that his group wished to obtain the Committee's judgment on either leaving the infant oil shale industry where it was "under the present mining laws and the present Departmental regulations," or the "speedy enactment of such legislation as may be necessary to foster, safeguard, and establish" an oil shale industry, and observed that "any delay in determining the rights and privileges of those who are engaged in the shale oil industry will militate against the growth and establishment of that industry." App. 26-27. He reviewed the increasing demand and rapidly increasing prices for petroleum products and the potential for the development of a shale oil industry.

He expressed the view that a successful oil shale industry could be developed given proper management, the achievement of economies of scale and a continuation of favorable economic trends. He also reviewed the efforts of the Department to encourage the development of an oil shale industry, including its assurances that mining claims located on Green River Formation oil shale lands were regarded as eligible for patent. He urged the Committee, if it recommended legislation, "to provide specifically for all those who had gone on and made their locations in an honest and sincere effort to develop the industry. Nothing should be done which could in any way impair their initiated rights." App. 32. Congressman Taylor, who represented the oil shale district in Colorado and was a member of the Public Lands Committee and a member of the Conference Committee on the Mineral Leasing Act of 1920, strongly supported George, noting that the Director of the Geological Survey had authorized him to assure his constituency that there would be no more withdrawals of oil shale land than had been made for the Naval Oil Shale Reserves. App. 32. He stated that the senior Department officials had

> "for years, been urging these men to do this very thing, to locate and patent these shales under the placer law, and we do feel that, backed up with all of their letters and encouragement and classification, at my specific request, and all of their publishing to the world to the effect that 'We won't make any more withdrawals of shale land; go ahead and develop them if you can, and patent them under the placer law,' we do not believe they will now repudiate their actions and turn down these people who are following their specific and direct instructions right along . . . [T]hese high officials will not welch on their own representations and instructions. Since talking with those gentlemen I believe if that kind of a provision is put in this bill it will be scrupulously recognized and en-

> forced, and all those people who strictly comply with the law will get a patent. . . ." (App. 37; *see generally* App. 26-37, and Ex. G-384, excerpts of the 1918 House hearings.)

The House Committee proved receptive to this approach, and the Department advised the oil shale contingent that it would not be necessary to repeat the presentation to the Senate Public Lands Committee. App. 76. The House Committee then reported out amendments to the bill (S. 2812) that had been the subject of the hearings, including the addition of valuable "oil shale" lands to the mineral lands to be leased in the future and including also a savings clause, proposed as Section 28 of that bill. The "oil shale" amendment was offered on the House floor by Congressman Raker for the Committee, who stated

> "The gentleman from Colorado [MR. TAYLOR] should have offered this. It is an oversight in the printing. It is the gentleman's amendment offered in the committee."

The Clerk then read an amendment adding "oil shale" after "oil", whereupon Congressman Taylor stated, "We will accept that amendment. . . . [R]epresenting as I do the State and county having more oil shale than all the other States combined, we accept that amendment." Congressman Raker then stated "It belongs there; and after the committee adopted Section 28, of course it should go in there." 56 Cong. Rec. 7033 (May 24, 1918).

Congressman Raker's comment underscores the key inter-relationship between the addition of "oil shale" to the Leasing Act, proposed by Congressman Taylor who was surely sympathetic to his constituents, and the savings clause, which Congressman Raker explained to the House as "another important feature that has been added . . . which protects those who have initiated claims upon the

public domain. . . ." (*Ibid.*) As Raker later explained, the addition of "oil shale" had been

> "one of the special provisions in the bill that has been given more careful consideration by the committee, and especially by a subcommittee consisting of Senator LENROOT and myself, who spent much time on it. The committee had many conferences, and it is one vital to legislation of this kind, because it repeals all the laws relating to the subject in hand. The purpose was to protect those who had valid claims. I believe that this repealing clause does that. . . ."[20]

The petitioner's argument depends upon the proposition that "oil shale" was added by Congress to the list of leaseable minerals even though not "valuable." The Congress, however, was more precise, and the argument is baseless. Oil shale as such was not set aside for leasing; only oil shale deposits in "lands valuable" for oil shale were reserved for leasing. 56 Cong. Rec. 7104 (May 25, 1918); Mineral Leasing Act of 1920, Section 37, Ch. 85, 41 Stat. 451, 30 U.S.C. 193.[21] If there were not, as the peti-

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[20] *Id.* at 7105 (May 25, 1918). Congressman Raker's remarks and other floor discusion also make clear that the savings clause was intended to protect persons who had invested substantial amounts in drilling for oil, but had not yet struck oil at the time an executive withdrawal had been made or the Leasing Act had gone into effect. The proposed savings clause in Section 28 (*id.* at 7104) spelled out precisely how much an oil driller would have been required to have spent to be protected. These lengthy provisions were telescoped in the final savings clause, Section 37 of the Mineral Leasing Act of 1920, into the phrase "including discovery" after the phrase "which claims may be perfected under such laws". This point is important here only because the petitioner's brief erroneously appears to suggest (p. 27) that "including discovery" reflected some uncertainty whether Congress thought that oil shale was valuable. That is not the case; "including discovery" referred to bona fide claims on which minerals had not yet been found. *E.g.*, 58 Cong. Rec. 4584 (August 30, 1919).

[21] Similarly, Interior did not regard all oil shale deposits as patentable; lands containing oil shale were patentable only "if valuable." The petitioner's brief (p. 28) errs in implying that the Department's reference to the value requirement in advising the public about the mining laws (*e.g.*, App. 33-34), meant that no oil shale was valuable.

tioner now contends, any lands "valuable" because they contained oil shale, the set-aside for oil shale leasing was, and is, entirely nugatory.

As Congressman Raker's comment quoted above shows, the Senate had been appropriately consulted and had agreed to the addition of "oil shale" in lands valuable thereby, and the savings clause. Since the Department of the Interior and oil shale claimants supported these additions, the inclusion of oil shale within the Mineral Leasing Act was not subsequently the subject of any legislative controversy or even extended public discussion.[22] The congressional references to oil shale in 1919 and early 1920 were all consistent with the patentability of prior claims and reflected an awareness that a commercial industry lay sometime in the future. *E.g.*, App. 45-48; 58 Cong. Rec. 4271-72 (remarks of Senator Smoot) (Aug. 25, 1919). Typical are the remarks of Representative Sinnott on the House floor on February 10, 1920, 57 Cong. Rec. 2709:

> "[T]he bill is practically the same as it passed the House last October. It is also modeled on the bill that passed the House at the last session and the session before and the session before.
>
> "In brief, the bill does away with and repeals the present laws providing for the patenting and the absolute disposal by the Government of the mineral resources named in the bill. This bill is strictly a leasing bill. No longer can patents be issued deeding away these mineral resources of the Government, except as

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[22] In reporting the amended bill to the House, the Chairman of the Public Lands Committee, Congressman Ferris, stated "The bill as it stands has the support of the Public Lands Committee, as well as the support of the three departments—the Department of Justice, the Navy Department, and the Interior Department. . . ." 56 Cong. Rec. 6982 (May 23, 1918). The Committee's Report (No. 563, 65th Cong., 2d Sess., May 14, 1918), which discussed oil shale at length, appears in the 1918 Congressional Record at pp. 6984-87.

> to some valid claims now existing upon mineral lands provided for in section 37 of the bill. But apart from that, no longer will . . . oil shale . . . be deeded away by the Government."

Congressman Taylor of Colorado, who had actively participated in the key 1918 oil shale hearings before the Department and the House Committee, served as one of the House Conferees. See H. Conf. Rep. No. 600, 66th Cong., 2d Sess. (Feb. 6, 1920). He stated at the 1926 rulemaking hearing in *Freeman* v. *Summers,* conducted by Secretary of the Interior Work (see pp. 69-70, *infra*), that

> "As a member of the Public Lands Committee of the House I helped to pass that provision of the leasing law, section 37 of the act of February 25, 1920, compelling, as us Members of Congress then thought, the Interior Department to recognize and administer the mining law as it existed and was construed up to and at that time, and to recognize the rights of the people who had made [oil shale] locations in good faith under the mining statutes at that time." (Ex. G-729, pp. 107-108.)

The testimony of former Senator Thomas, also of Colorado, at House hearings in 1931 on the Ralph Kelley charges likewise demonstrates the understanding of Congress in extending the Mineral Leasing Act to oil shale, with the savings clause, that there were valid oil shale claims and the intention of Congress to protect them from just that sort of administrative *volte-face* represented by the present controversy.

> "I was a member of the Committee on Public Lands of the Senate during the consideration of that bill [Mineral Leasing Act], and Members of the Senate from the Rocky Mountain States were during that time besieged, in person, by wire, and by letter, to at all hazards protect their undeveloped and uncompleted locations of shale land from the operation of the bill. I think the

same was true with gentlemen then forming the House Committee. The chairman of your committee at that time so informed me; and therefore one of the outstanding purposes and objects of those representing that section [37] was to safeguard these inchoate rights which were then supposed to be in jeopardy.

"The result of those appeals and of our efforts was that exception which was designed to keep those claims under the law of their origin. . . . it was our intention that they should occupy the same position in the mining law of 1872 after the leasing act was passed that they would have occupied if no leasing act had ever been passed. And I may add that if we had had the remotest idea that the exception was not to be so administered, the bill would never have been passed." (Ex. C-320, pp. 124-125).

The record of Congressional consideration of the inclusion of oil shale in the Mineral Leasing Act, in the context of the savings clause, compels the conclusion that Congress determined that lands of the Green River Formation containing substantial oil shale deposits satisfied the discovery requirements of the mining laws and that pre-Leasing Act claims on such lands were valid and eligible for patent. The Department's latter-day construction that no Green River Formation oil shale claim ever was eligible for patent cannot be squared with that intention.

Extensive citation of authority is hardly necessary for the proposition that in the construction and application of federal statutes it is the intent of Congress that is controlling. It should not go unmentioned, however, that the contemporaneous and undoubtedly well-informed view of the Department was that the inclusion of oil shale within the Mineral Leasing Act, coupled with the savings clause, was indeed a congressional recognition of the value and patentability of oil shale. The Department had occasion to record its views on these matters when General Land Office officials forwarded to the secretarial echelon the first

oil shale patent application, noting in an April 20, 1920, memorandum (App. 48-49) that many oil shale placer claims had been initiated, "some in good faith, probably more otherwise," that "discovery is easy as to those claims that are located along the outcrops" (which is the case for the Mountain Boy and Shoup claims at issue here), and cautioning that "if we patent any oil shale placer claims, the Leasing Act will be a dead letter as to oil shale for some time." The memorandum also stated that the (promptly promulgated) oil shale leasing regulations, 47 L.D. 424, had been "designed not to admit the existence of such a thing as a valid claim under the placer laws," the same view that the Department now urges. The Department's response, however, was its *Instructions* of May 10, 1920, 47 L.D. 548, App. 49-54, adhering to the Department's prior view that oil shale was valuable and patentable.[23] The *Instructions* cited as a basis for this conclusion the 1916 classifications and the savings clause of the Mineral Leasing Act, which were characterized as recognition of oil shale "by the Department and by Con-

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[23] The petitioner attempts to evade the force of the *Instructions* by fastening on the words "if valuable" in the phrase in the *Instructions* referring to previous Department statements in which the Department had "declared itself as favorable to the view that such deposits, if valuable, are subject to location and purchase under the mining laws." See Brief, p. 28. This obviously did not mean that the Department did not have an affirmative view as to the value of the oil shale deposits of the Green River Formation; the whole history of the inclusion of oil shale in the Mineral Leasing Act belies that. The prompt issuance of patent on the application which had occasioned the *Instructions* confirms that the meaning of the *Instructions* was neither unfavorable to the value of oil shale nor ambiguous. What the *Instructions* meant by this reference to "if valuable," and what the Department continued thereafter to insist on, was the necessity for a showing in any particular case that a claim presented for patent did in fact contain the rich oil shale measures of the Green River Formation as distinct from the marginal beds below the rich zone. The record below shows examples of the rejection of the validity of claims in such cases. *E.g., United States* v. *Bailey,* Contest 3215 (June 22, 1923), holding that those portions of the claims in contest below the 6,400-foot contour line were "non-mineral in character" and were to be eliminated from the claims. Ex. C-363.

gress as a mineral deposit and a source of petroleum." App. 53-54. If there were otherwise any doubt as to the intent of Congress, this contemporaneous administrative construction would be entitled to significant weight. *F.H.A.* v. *The Darlington, Inc.*, 358 U.S. 84, 89-90 (1958); *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396 (1956); *United States* v. *Wyoming*, 331 U.S. 440, 454 (1947); *Brennan* v. *Udall*, 251 F.Supp. 12, 23 (D. Colo. 1966), *aff'd*, 379 F.2d 803 (10th Cir.), *cert. denied*, 389 U.S. 975 (1967).

B. Congress further expressed its understanding and intent that pre-Leasing Act oil shale claims were eligible for patent when in 1930-1931 it reviewed the first decade of the issuance of oil shale patents and signified its expectation that such patenting would continue.

As the petitioner's brief recognizes (p. 31), the occasion for congressional review of the first decade of the patenting of oil shale claims was a series of fourteen articles which appeared in the *New York World* in October 1930 written by a disgruntled Interior field official, Ralph S. Kelley, whose charges raised the spectre of Teapot Dome with respect to such patenting.[24] The nature of Kelley's

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[24] Petitioner's brief (p. 31, n. 10) makes a point of noting that E.C. Finney, who drafted the *Freeman* v. *Summers* decision, had been Assistant Secretary under Secretary of the Interior Albert B. Fall at the time the Teapot Dome leases were issued. The petitioner apparently suggests guilt by association twice removed: Fall was guilty, therefore Finney should be deemed guilty, and therefore *Freeman* v. *Summers* should be deemed a corrupt decision. In fairness to Finney, it should be noted that he was a career Department official, who formerly had been a judge, that he had been active throughout the Wilson administration in recommending that oil shale be included within the Mineral Leasing Act (*see, e.g.*, App. 9-10, 72), and that it was he who directed the Commissioner of the General Land Office in 1927 (the year *Freeman* v. *Summers* was decided) to make a thorough investigation of all oil shale locations of record, so that, with the ample evidence then available that might not be available later when patent applications were sought, the Department could accurately ascertain which claims were valid and which were not. App. 58-59. Those investigations led to the assertion of Departmental challenges to thousands of oil shale claims, many for alleged defaults in performance of annual assessment work but also many for additional charges. App. 106-107, 100-101, 103-104.

charges and the obvious partisan interest of Democrats such as Senator Walsh in bringing to light any impropriety in the patenting of oil shale lands caused senior Interior Department officials to demand a complete and thorough investigation, so as to obtain "clearance" for their conduct, and these circumstances led Senator Walsh and his congressional colleagues to make searching inquiries. The charge of "Teapot Dome Revisited" set the stage for one of the most thorough congressional reviews of administrative practice ever conducted, a review which focused in particular on Department practices and rulings concerning discovery and the consequent patenting of oil shale claims.

Thus, in November 1930, Secretary Wilbur wrote to the Chairmen of the Public Lands Committees of the House and the Senate, in part about legislative clarification of questions relating to assessment work on oil shale claims,[25] but noting that those questions were

> "only part of the general problem as to the oil shale lands, and it may be that other phases of it not now covered by legislation, such as the question of discovery . . . will impress you as requiring legislative definition." App. 71.

In his testimony on the first day of the Senate hearings, Secretary Wilbur personally requested that the Committee conduct a full investigation of Kelley's charges, stating "We feel that we should have clearance in the Senate," to which Senator Walsh replied "Absolutely." App. 89.

The investigation by Senator Walsh proceeded pursuant to Senate Resolution 379, which charged the Public Lands Committee to investigate Kelley's charges and

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[25] Assessment work was then in controversy as a result of the Department's efforts to limit the effect of *Wilbur* v. *Krushnic*, 280 U.S. 306 (1930). *See Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639 (1935); App. 101.

> "the practices, rulings, and actions of the Department of the Interior in relation to the preservation or disposition of such [oil shale] lands, or of applications for patent to the same, and to make such recommendations as to it may seem appropriate touching needed legislation or other Governmental action for the recovery of any such lands . . . or for a review of any final award by the Secretary of the Interior of any such lands." App. 87-88.

The reference to "recovery" of oil shale lands which had been patented and to "review" of final awards by the Secretary of any such lands was no idle threat. One consequence of the congressional inquiry into Teapot Dome had been the institution of litigation to cancel the oil leases in question,[26] and had the Committee concluded that oil shale patents had been wrongly awarded, suits to cancel patents within the six-year statute of limitation would have afforded a large measure of relief, if successful,[27] and would have established legal doctrine for the future.

Senator Walsh, whose thorough probing had uncovered the Teapot Dome scandal, took the lead in the investigation, stating at the outset that Kelley's charges "center very largely about this so-called Freeman-Summers case." App. 89. Senator Walsh reviewed that case in detail, questioning Solicitor Finney, the author of the decision, at length. The hearings documented Interior's consistent application of the 1920 *Instructions* in patenting oil shale claims from 1920 to 1930. *See 1931 Senate Hearings* (Ex. G-729) 14, 24-27, 211, 213, 341. Interior explained that even though oil shale

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[26] *See* the Joint Resolution, approved February 8, 1924, authorizing and directing litigation to cancel the leases. 43 Stat. 5.

[27] 43 U.S.C. 1166, 26 Stat. 1093 (1891). Of the 1,177 oil shale claims which had been patented through 1930, 673 were then within the six-year period. *See* Exs. C-190 and G-104.

could not then be worked at a profit, the *Freeman* v. *Summers* decision had been an application of the classic prudent man test,[28] which occasioned the comment by Senator Walsh that he understood "perfectly well" the basis for the decision. App. 96-97. In contrast, Ralph Kelley failed in his testimony to establish any wrongdoing on Interior's part, and his credibility was severely impeached when it was brought out that he had written the newspaper articles for his own personal financial profit while still in the Department's employ, and that he had misrepresented to his superiors the state of his health so that he could absent himself from his official duties to pursue the preparation of the articles and to arrange for their publication. App. 99; *1931 Senate Hearings* (Ex. G-729) 287-351.

The outcome of the hearings was not only that the Committee made no recommendation for any change in Interior's practices, or for any effort to reclaim any lands, but also that the Committee authorized the Department to resume the processing of pending patent applications, which had been suspended following publication of Kelley's charges. Shortly following the hearings, Secretary Wilbur wrote to Senator Nye, Chairman of the Senate Committee, apparently reiterating his request for "clearance," to which Senator Nye responded, "I have conferred with Senator Walsh and beg to advise you that there is no reason why your Department should not proceed to final disposition of the pending application for patents to oil shale lands in conformity to the law." App. 103. The Department had previously indicated its expectation that in conformity to the law additional patents would issue.[29] While Senators Nye and Walsh did not, of course, indicate that

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[28] *Accord,* Ex. G-522, March 2, 1921, Letter by First Assistant Secretary Vogelsang. App. 56.

[29] Secretary Wilbur stated in the Senate Committee hearings that, "Any oil-shale claimant who complies wtih the law can expect his claim to go to patent uninfluenced by any hysteria arising from Mr. Kelley's statements." *1931 Senate Hearings* 215; *see also id.* at 213, 341.

any particular claims should go to patent, one could hardly imagine a more explicit statement of congressional intent approving in principle the continued patenting of Green River Formation oil shale claims.

The House hearings, which had begun prior to the Senate hearings but continued after them, also included testimony from Secretary Wilbur and Ralph Kelley. The House Report recommended no change with respect to discovery,[30] but called for modifications of the mining laws, with respect to oil shale claims only, to require performance of assessment work, to provide protection to bona fide purchasers against charges of fraudulent initial location, and to provide that any oil shale claim for which patent was not applied by July 1, 1934, would be deemed abandoned. H.R. Rep. No. 2537, 71st Cong., 3rd Sess. (Ex. C-380). It is obvious that these recommendations reflected an understanding that valid oil shale mining claims existed and that the Committee expected Interior's past practices with respect to discovery to continue. This conclusion is reinforced by the fact that the House report included mention that one of the questions that had been presented to the Committee by Secretary Wilbur was "What shall be done with questions of discovery?" App. 81. The report concluded that its recommendations for limited changes in the mining laws would provide guidance "necessary, proper, and advisable for the final disposition of the questions affecting oil shale lands." *Ibid.*

As the petitioner notes, the House report did not result in legislation. The important point, however, is that the Committee clearly disclosed the understanding and intent that patenting of oil shale claims would continue, and

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[30] The Report, excerpted at App. 80-84, noted that the Mineral Leasing Act had "entirely changed" the public land policy of the United States "as to all lands valuable for oil shale," but that the savings clause had excepted prior valid claims. App. 80.

would continue indefinitely unless its recommended time limit were enacted. Had the Committee shared the petitioner's view that oil shale was not "valuable" and that no oil shale claim had ever been valid, it would hardly have recommended legislation requiring oil shale claimants to file patent applications. As for actual legislation, Congress did on several occasions in the 1930's and thereafter amend the mining laws so as to suspend the annual assessment work requirements,[31] a matter then of substantial controversy with respect to oil shale mining claims. *See, e.g.,* App. 101; *cf. Ickes* v. *Virginia-Colorado Development Corp.,* 295 U.S. 639 (1935).

Congressional acquiescence in a well-established administrative practice known to the Congress is to be taken as an indication of congressional approval which is not to be thereafter disregarded by administrative agencies. Where, as is the case here, Congress has intensively investigated an administrative practice and through its Committees endorsed that practice, the same conclusion is even more compelling. That conclusion is still further reinforced by the fact that Congress since 1930 has amended the mining laws on several occasions without making or suggesting any change with respect to the Department's practice of recognizing as valuable the oil shale deposits of the Green River Formation. *E.g., Saxbe* v. *Bustos,* 419 U.S. 65, 74 (1974) ("longstanding administrative construction is entitled to great weight particularly when . . . Congress has revisited the Act and left the practice untouched."); *Fribourg Nav. Co.* v. *Commissoner,* 383 U.S. 272, 283-284 (1966)

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[31] Act of June 6, 1932, 47 Stat. 291, *as amended* 474; Act of May 18, 1933, 48 Stat. 72; Act of May 15, 1934, 48 Stat. 777; Act of June 13, 1935, 49 Stat. 337; Act of April 24, 1936, 48 Stat. 1238; Act of June 24, 1937, 50 Stat. 306; Act of June 29, 1938, 52 Stat. 1234; Act of May 7, 1942, 56 Stat. 271; Act of May 3, 1943, 57 Stat. 74; Act of June 17, 1948, 62 Stat. 475; Act of June 17, 1949, 63 Stat. 200; Act of June 21, 1949, 63 Stat. 214.

(reenactment of depreciation provisions of the tax law precluded change in administrative construction); *Zemel* v. *Rusk*, 381 U.S. 1, 12 (1965) (1952 reenactment of the 1926 Passport Act held to confirm practice of issuing passports with area restrictions, although the legislation did not relate to that question); *Udall* v. *Tallman*, 380 U.S. 1 (1965); *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396-97 (1956) (the Commissioner of Internal Revenue held precluded from altering a long-continued practice "that . . . has had both express and implied congressional acquiescence, through the 1918 amendment to the statute which has ever since continued in effect, and through Congress having let the administrative determination remain undisturbed for so many years"); *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 366 (1951) (reenactment without change of provisions of the National Labor Relations Act); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 313 (1933) ("Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years"); *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 474, 481 (1915); *United States* v. *Philbrick*, 120 U.S. 52, 58-59 (1887) (regulations of the Secretary of the Navy sustained where the power had "been frequently exercised . . . without objection by the legislative branch of the government"); *Brennan* v. *Udall*, 379 F.2d 803, 806 (10th Cir.), *cert. denied*, 389 U.S. 975 (1967).

This case is wholly unlike cases such as *TVA* v. *Hill*, 437 U.S. 153 (1978), and *SEC* v. *Sloan*, 436 U.S. 103 (1978), upon which the petitioner relies. They stand only for the proposition that plain statutory language will not be disregarded on the basis of subsequent statements within Congress of a contrary interpretation of a statute. Here there is no conflict whatsoever between congressional approval in 1930-1931 and subsequent years of continued patenting of oil shale claims, on the one hand, and the congressional decision, in enacting the Mineral Leasing

Act, to include oil shale and to preserve previously initiated oil shale mining claims as eligible for patent, on the other. Nor is there any conflict with any other expression of congressional intent. Quite the contrary, each such expression supports the congressional intent expressed in the early 1930's.

C. The enactment in 1956 of legislation to facilitate the issuance of oil shale patents further confirmed and expressed the understanding and intent of Congress that pre-Leasing Act mining claims within the Green River Formation were eligible for patent insofar as discovery requirements were concerned.

Under the authorities just cited, pp. 44-45, *supra,* the congressional intention manifest in the Act of July 20, 1956, 70 Stat. 592, 30 U.S.C. 122, would suffice to foreclose the Department's attempt to repudiate the patentability of oil shale claims, even if it were the only indication of congressional intent. As noted above, pp. 16-17, the 1956 legislation was clearly motivated by a congressional desire to facilitate the patenting of pre-Leasing Act oil shale mining claims, a silly objective, indeed, if the Department's current position should be upheld, that no oil shale mining claim has ever been eligible for patent.

The petitioner attempts to evade the significance of the 1956 legislation by asserting that the subject of discovery was not extensively discussed, but that is not persuasive because there of course comes a time when a practice and a congressional understanding are so firmly fixed that there is no occasion to start a discussion from first principles. While Congress had no occasion to discuss discovery requirements at length, discoverability and locatability of oil shale was taken for granted, for surely those participating in consideration of the 1956 legislation understood that there were such things as pre-Leasing Act oil

shale mining claims within the Green River Formation that satisfied the discovery requirements of the mining laws and that were eligible for patent, in accordance with the long-established uniform practice of the Department dating from at least 1920. These participants included not only members of the Congress, including Chairman Wayne Aspinall of the House Interior Committee whose district included many oil shale mining claims, but the Department of Interior itself, which endorsed the legislation.[32] The Department explicitly informed the Congress that the patenting of oil shale mining claims was continuing, 67 such patents covering approximately 85,000 acres in Colorado having been issued between 1946 and 1955 (App. 117), and that the legislation was intended "to clear up" a problem concerning "valid and subsisting rights acquired by discovery and location under the mining laws prior to the enactment of the Mineral Leasing Act of February 25, 1920...." App. 119.

How Congress could more clearly have signified its continuing intent and understanding that oil shale claims were eligible for patent, petitioner does not state. Petitioner asks this Court to sustain petitioner's defiance of congressional intent, clearly expressed over the period from 1918 to 1956.[33] Yet, as the petitioner acknowledges, the responsibility to determine the disposition of public lands is vested in Congress. Respondents request no more than that this Court respects the manifest intent of the Congress.[34]

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[32] The legislative history is excerpted at App. 115-120.

[33] To justify such defiance, the petitioner's brief (p. 61) stresses the great value of oil shale, hardly a principled basis for concluding that oil shale is not valuable or that Congress has never recognized its value.

[34] As the court of appeals concluded, "the changes here sought to be made by the Department as to 1920 standards incorporated into the mining laws are well beyond executive authority." Pet. App. 18a-20a.

II. THE GREEN RIVER FORMATION OIL SHALE DEPOSITS WITHIN THE MOUNTAIN BOY AND SHOUP CLAIMS SATISFY THE VALUE REQUIREMENTS OF THE MINING LAWS, AS OF BOTH THE TIME OF LOCATION AND THE PRESENT.

The undisputed testimony of Interior's own witnesses established that the Mountain Boy and Shoup claims contain extensive deposits of Green River Formation oil shale. These deposits include between 500 and 600 continuous vertical feet of oil shale that will yield an average of 15 gallons of oil per ton ("GPT")—some 600,000 barrels of oil per acre, or 96,000,000 barrels per 160 acre claim. They include 75-80 continuous vertical feet yielding an average 30 GPT, or about 100,000 barrels per acre, or 16,000,000 barrels per 160 acre claim, and about 13 continuous vertical feet yielding an average 42 GPT—some 5,200,000 barrels per claim. *E.g.*, App. 137-138.

Petitioner argues that these deposits are not "valuable mineral deposits" for purposes of the public land laws, including in particular the mining laws, Act of May 10, 1872, secs. 1, 6, 17 Stat. 91, 92; 30 U.S.C. 22, 29. By "valuable mineral deposits" it is, of course, true that Congress meant "valuable in an economic sense," that is, value which justifies the expenditure of effort to develop a paying mine with a reasonable prospect of success. That is the classic formulation in *Castle* v. *Womble*, 19 L.D. 455, 457 (1894), subsequently approved by the courts. *Chrisman* v. *Miller*, 197 U.S. 313 (1905); *United States* v. *Coleman*, 390 U.S. 599, 602 (1968). Under the statutory scheme a claim never comes into existence unless in connection with location of the claim there is a "discovery" of a valuable mineral, hence the test must be met at the time of location. It must also be met at the time an application for patent is made, for it must be shown at that time that "the claim is valuable for minerals." *United States* v. *Logomarcini*, 60 I.D.

371, 373 (1949); *The Clipper Mining Co.* v. *The Eli Mining and Land Co.*, 33 L.D. 660, 665 (1905). Thus, worked-out claims which have insufficient mineral value are not entitled to patent. *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963).

Petitioner contends that a mineral must be immediately marketable at a profit to be valuable. In the first place, this contention overlooks the fact that Interior's own evidence showed that oil shale from the Mountain Boy and Shoup claims could have been marketed at a profit at the time of the locations and at the present. See p. 50 n. 36, below. But in the second place, the contention is erroneous; the mining laws require present value, but this can be established by facts that show reasonable prospects of developing a paying mine, *i.e.*, of future marketing at a profit.[35] The weakness of Interior's contention appeared in examination of its own expert economic witnesses in this proceeding. Thus, Dr. William Vogley testified that raw oil shale "had a value as a possible source of future shale oil" and "has" such value now, and in answer to a question by Interior counsel whether "the value you are talking about is or was

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[35] *E.g.*, *Barton* v. *Morton*, 498 F.2d 288, 291-292 (9th Cir.), *cert. denied*, 419 U.S. 1021 (1974) ("Room remains afte discovery of the mineral deposit for application of the principle that the claimant need only show a reasonable prospect that a profitable mine will be developed. The margin between a valuable mineral deposit and a profitable mine may be substantial.").

Congress expressed the same understanding in enacting the Mineral Leasing Act of 1920. During the House debate, Congressman Howard suggested changing "valuable deposit" to "paying". The floor manager, Congressman Sinnott, replied:

> "That language was put in with a great deal of consideration, and we would not like to change from 'valuable' to 'paying.' There is quite a distinction. We are in line with the decisions of the courts as to what is a discovery, and I think it would be a very dangerous matter to experiment with this language at this time." 58 Cong. Rec. 7537 (October 25, 1919).

a present value [or] . . . is or has been a possible future value," Dr. Vogley stated that oil shale "had a present value as a future source of petroleum" and that in his opinion "that answer refers to the entire period of time" from 1917 to the present. App. 140.

This conclusion was buttressed by detailed evidence introduced by Interior showing that commercial-scale operations on the claims at the time of location and at the time of the hearing would have yielded positive returns.[36] Each of these models calculated the expectable return over a postulated "project life." In the case of the 1915-1920 model, the analysis assumed a project life of 17½ years; in other words, in terms of the 1918 date of location of the Mountain Boy claims, it projected the venture forward to 1935-36, a step obviously requiring assumptions as to the course of future costs and receipts and thus as to the future conditions of the petroleum market which shale oil was expected to supplement. Similarly the 1966 model assumed

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[36] *See, e.g.*, Pet. App. 97a-100a. Interior prepared and introduced in evidence at the hearing elaborate cost studies of commercial-scale exploitation of the Mountain Boy and Shoup claims as of the time of location of the claims (1915, 1918, 1919, Exs. G-665 and G-666) and as of the time of the hearings in 1966 (Ex. G-667). The study for the earlier period showed an annual book yield of 7.1 percent, 6.6 percent, and 3.0 percent for 1915, 1918 and 1919, respectively, and a small loss for 1920. The 1966 study showed a return of just under 10 percent. The testimony of the witnesses who participated in preparation of the studies showed that the basis for the studies was (in the words of witness Phillips) "the then current thinking and state of knowledge augmented by whatever assumptions were found to be necessary and reasonable in order to cover all design aspects from the oil shale mine to finished products." App. 132-133.

It is self-evident that these studies were intended to present Interior's no-value theories in the best possible light consistent with the facts. That they fail so signally to confirm that contention is no doubt the reason that the Board of Land Appeals referred to their results principally for the purpose of trying to discredit their significance. Pet. App. 105a.

a project life of 17 years and calculated a "true yield" of 9.84 percent over that period.

This evidence reinforces the logically irrefutable and commonplace observation that present value is a judgment about the future discounted back to the present. It is only when approaching the concept of "value" for the purposes of this case that Interior abandons the real world for a verbal morass in which value at any given time is made to depend on hindsight, and the absence of subsequent commercial-scale development is held to establish the lack of value at a prior time. Interior's other decisions have never required such a showing. For example in *United States* v. *Fairchild,* A-30803 (January 19, 1968), it was stated that:

> "The Department has never said that the rule of *Castle* v. *Womble* requires a demonstration of profits as a 'present certainty' in order to establish the existence of a discovery."

Or as was said in *United States* v. *Smith,* 66 I.D. 169, 172 (1959):

> "The mining laws do not require . . . that the values shown must be such as will demonstrate that a claim can be worked at a profit. . . ."

Or, again, as was said in *United States* v. *Myers,* 74 I.D. 388, 390 (1967):

> "A reasonable prospect of success does not mean a sure thing. The word 'prospect' itself does not connote a certainty."

The Court has been properly concerned that the mining laws not be perverted to serve as a vehicle for acquisition of land for non-mineral purposes on an insubstantial showing of claimed mineral values. This was the setting for *Cameron* v. *United States,* 252 U.S. 450 (1920): the alleged

mining claims in suit lay on the rim of the Grand Canyon immediately adjacent to the railroad terminal at the head of the Bright Angel trail, and the "miner" used the site for a livery stable from which he conducted a profitable tourist trade in mule rides to the floor of the Canyon. Similarly, in *United States* v. *Coleman,* 390 U.S. 599 (1968), the evidence suggested that the supposed mineral value of the land was not the real basis of the claimant's interest: the improvements on the claims "had gone largely into the construction of a residence, domestic water supply and sewage disposal facilities" (Gov't Brief to the Supreme Court, pp. 6-7), and the claims themselves were in a "highly scenic national forest located two hours from Los Angeles" (390 U.S. at 603), which contained areas "set aside as unspoiled wilderness and recreational facilities . . . including camp sites and skiing facilities" (Gov't Brief, pp. 4-5, note 1).

By contrast, the evidence is clear in numerous Government reports and surveys that the non-mineral values of the oil shale lands are nearly non-existent.[37] Indeed, it is manifest that it was widespread public recognition of the mineral value of the oil shale deposits, fanned by Interior's investigations, reports and public statements in the period 1913-1920, which led to the location of the claims in suit and the hundreds of claims heretofore patented. There is no misuse of the mining laws in recognizing their validity.

Even more compelling than the economic analyses prepared by Interior for the hearing below is the massive evidence showing that the Government itself, contemporaneously with the location of the Mountain Boy and Shoup claims, recognized that the Green River Formation oil

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[37] Interior's reports on the Mountain Boy claims, for example, emphasize the arid climate, the fact that the value of the claims for their oil shale was "great" but "only nominal . . . for other uses" and that the timber was "non-commercial." App. 121. The nominal extent of the grazing value is shown by a 1962 grazing lease fixing the rental at one-half the general taxes on the land. Ex. C-759, p. 1.

shales satisfied the value requirements of the mineral land laws, and that the private sector contemporaneously also regarded the oil shales as valuable.

The starting point for this recognition was the continuous investigation of the Green River Formation begun by the United States Geological Survey in 1913, which resulted in a series of classic publications. The first of them appeared in 1915 as U.S.G.S. Bulletin 581-A by E. G. Woodruff and D. T. Day (Ex. G-20). It was followed in 1916 by U.S.G.S. Bulletin 641-F by D. E. Winchester (Ex. G-21), which made the explicit point that "the thickest and richest beds of shale are exposed along the southern margin of the basin," precisely where the claims in suit lie. These and subsequent Government publications, and mass media reports based upon them, resulted in widespread awareness of the existence of the oil shales at issue here.[38]

There was also widespread awareness of economic factors contributing to the value of these oil shales. These factors included the great and recent growth in demand for oil, the failure of any commensurate growth in domestic production, the consequent increase in price (nearly five-fold from 1915 to 1920) and increasing reliance on imported (then mainly Mexican) oil, and a decline both in supply relative to current demand and in known reserves relative to predictable consumption. Department reports and statements by Secretary of Interior Lane emphasized the approaching peak of production and "gave

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[38] The Hearing Examiner noted that "The rich oil shale strata of the Upper Oil Shale Zone can be seen in horizontal beds along the escarpment which extends for many miles through Western Colorado, including the three sides of the peninsula on which the claims are located. Mountain Boy Nos. 6 and 7 and Harold Shoup Nos. 1, 2, 3 and 4 have massive exposures of the oil shale of this zone which can be readily observed at a distance without going on the claims. At the time the claims were located, the geology of the Green River Formation and the location of the oil shale within the formation had been well publicized." Pet. App. 175a.

ominous implications to the decline." App. 134; *see generally* App. 22-24, 26-33, 77, 104-105, 120, 133-135.

In addition, there was the history of successful commercial oil shale industries abroad, particularly in Scotland. Interior's publications contain extensive references to the Scottish industry and note that Green River oil shale compared favorably in yield with the Scottish shale, and that the Colorado beds were much thicker and more regularly bedded and thus more readily mined than the thinner, faulted Scottish shale. *E.g.*, App. 23, 143-144.

The logical conclusion from these facts, that the Green River Formation oil shales were valuable mineral deposits, was explicitly reflected in, and reinforced by, contemporaneous actions by the Government and the private sector. Prominent among these actions was the classification early in 1916 by the United States Geological Survey of much of the Green River Formation as valuable as a source of petroleum and nitrogen. See pp. 27-30, *supra*.

The lands classified in 1916 included the lands located within the next two years as the Mountain Boy and Shoup claims.[39] In classifying lands as mineral, the Survey was thus confirming that there were reasonable prospects for developing a paying mine; the basic purpose of such classification was to separate valuable mineral lands from those that were not such and thus could be obtained under the non-mineral land laws. *E.g., Samuel D. Pulford, et al.*, 45 L.D. 494, 500 (1916), quoted *supra*, pp. 27-28.

A second contemporaneous action that reflected and reinforced the recognition that oil shale was valuable was

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[39] Although there have been subsequent additions to and subtractions from the area classified in 1916, the claims in suit have been unaffected. The standards for classification of oil shale lands were revised by the Survey in 1957, but it was the testimony of Interior's witness Horn that the so-called Mahogany Zone in the area of the claims contains oil shale "many times richer and thicker" than is required by the revised standards. App. 141-142.

the establishment in 1916 of Naval Oil Shale Reserves in Colorado and Utah. See pp. 5-6, *supra.*

Third, Interior recognized the value of oil shale in its administration of the Act of July 17, 1914, which authorized the issuance of homestead patents even though the land in question contained valuable deposits of enumerated minerals, provided that there was a reservation to the United States "of the deposits on account of which the lands were withdrawn or classified or reported as valuable . . ." 38 Stat. 509, 30 U.S.C. 121. One of the enumerated minerals was "oil", which in 1916 the Department construed to include oil shale, and, beginning in that year, patents issued under the 1914 Act for Green River Formation oil shale lands all reserve oil shale to the United States.[40]

Fourth, in the years between 1916 and 1920 spokesmen for Interior expressed in various additional ways the view that oil shale of the Green River Formation was a valuable mineral deposit within the meaning of the mining laws. That was the tenor of the Secretary's response in 1916 to inquiry from Senator Myers on behalf of private locators (App. 13); of Commissioner Tallman's statement in 1917 to a lawyer representing the West Slope Oil Shale Protective Association of Grand Valley, Colorado (App. 33-34);

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[40] *See Brennan* v. *Udall,* 251 F. Supp. 12 (D. Colo. 1966), *aff'd,* 379 F.2d 803 (10th Cir.), *cert. denied,* 389 U.S. 975 (1967). Paradoxically, Interior's present position that Green River Formation oil shale is not "valuable" threatens the interests reserved to the United States in patents on the more than 200,000 acres (*see* Exs. C-308, C-732) patented under the 1914 Act in Colorado and Utah. It is established law that a reservation is ineffective except as authorized by statute and that minerals purportedly but improperly reserved are nonetheless conveyed to the patentee. *E.g., Burke* v. *So. Pac. R.R.,* 234 U.S. 669, 710 (1914); *Davis's Administrator* v. *Weibbold,* 139 U.S. 507, 527-28 (1891); *United States* v. *Iron Silver Mining Co.,* 128 U.S. 673, 680-81 (1888); *Smallhorn Oil Shale Ref. Co.,* 52 L.D. 329, 332 (1928). Inasmuch as the 1914 Act authorized reservations of oil shale only where the oil shale deposits were valuable, Interior's argument points to the conclusion that the reservations were void and ineffective, and that *Brennan* v. *Udall, supra,* was erroneously decided.

of the advice given in 1917 to the State Geologist of Colorado by First Assistant Secretary Vogelsang that "I believe that public lands containing valuable deposits of oil shale are subject to entry and patent under the placer mining laws" (App. 21); of the statement made in September 1917, to Congressman Taylor of western Colorado by the Director of the Geological Survey (App. 19-20); and of the response of Secretary Vogelsang in December, 1917, to Congressman Ayers (App. 25). There are further examples in the Appendix and record.

Fifth, in reflection of these circumstances the decade 1910-1920 saw much private activity focused on the oil shale lands of the Green River Formation. The Hearing Examiner's decision reviews some of the extensive evidence of this activity; as he noted, "the evidence in this respect is massive." Pet. App. 145a. The early efforts concentrated in the area of the Mountain Boy and Shoup claims.[41] These activities and the expenditures they represented, as Interior's witness Netschert testified, reflected the optimism of those engaged in achieving a commercial success and "this optimism was in large part genuine." App. 134-135. One element in that optimism was no doubt the fact, as Interior's witnesses testified, that as a technological matter various petroleum products of marketable quality could then be made from Green River Formation oil shale.[42]

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[41] As the district court found, the fact that the early investors included persons of prudence and mining expertise such as Karl C. Schuyler, Sr., "who reasonably believed that a valuable mine could be developed is persuasive authority to satisfy the 'valuable mineral' test, even under *Castle* v. *Womble* . . . and *Coleman* . . ." Pet. App. 47a.

[42] One of these witnesses, Harold M. Thorne, had joined the Bureau of Mines in 1924 and begun work on oil shale in 1926; in 1928 he was appointed to take charge of shale oil refining studies at the Bureau of Mines laboratory in Boulder, Colorado; in 1944 he became chief of the Oil Research Branch of the Bureau's Petroleum Experiment Station in Laramie, Wyoming. It was his testimony that around 1920 the major products derived from petroleum could have been made from oil shale. App. 131-132. *See also* App. 122-131 (testimony of witness J. Blount Mull, also retired from the Bureau of Mines).

As to present value, Interior's own studies, prepared for this case, show that a positive annual return of approximately 10 percent could be realized from commercial operations around 1966 in the area of the Mountain Boy and Shoup claims. *See, e.g.*, Pet. App. 160a-165a. These studies are nothing less than admissions and thus should be given substantial weight. There is no contrary evidence, and the record contains several other current cost studies—uncontradicted—by Government and private persons alike, that also show positive returns from oil shale production. Pet. App. 161a-165a. Oil shale clearly satisfies the test of value. In fact, the Board conceded that if commercial operations had been currently established, it would have been "loathe to declare the claims invalid." Pet. App. 106a-107a, n. 55. Thus, if one accepts Interior's expert testimony—and the claim owners are entitled to do so—the present value of oil shale is undeniable.[43]

III. DURING THE YEARS 1916-1920 INTERIOR FORMULATED, IN 1920 INTERIOR PROMULGATED, AND FROM 1920 TO 1960 INTERIOR CONSISTENTLY MAINTAINED, AN ENTIRELY PROPER AND SOUND RULE RECOGNIZING THE VALUE OF GREEN RIVER FORMATION OIL SHALE, AND INTERIOR MAY NOT APPLY A CONTRARY RULE TO THE MOUNTAIN BOY AND SHOUP CLAIMS.

This issue presents a broad question of important legal principle: the power of a government agency to repudiate a long established, consistently applied, and reasonable rule which has constituted the law for decades. It is difficult to conceive of an agency rule of more considered formulation, longer standing, or more consistent application than the rule that oil shale deposits of the Green River Formation constituted valuable mineral deposits. If that rule can be

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[43] This has not prevented efforts to deny the undeniable. The Board of Land Appeals, for example, even implied that the oil shale deposits for which a federal lease bonus of 210 million dollars was bid in 1974 were not valuable. Pet. App. 107a-108a, n. 54.

overthrown by an agency *ipse dixit,* retroactive rule-making would appear to be beyond the reach of judicial review.

As Point II above demonstrates, the rule recognizing the value of oil shale was, at the very least, a reasonable application of the mining laws to the particular circumstances of the Green River Formation around 1916-1920. As the facts show, the rule was very thoroughly considered, was prominently published, was adopted contemporaneously with the enactment of the savings clause of the Mineral Leasing Act of 1920, was ratified by the Congress, and was consistently applied to thousands of oil shale claims for more than forty years.

It is well established that attempts at retroactive treatment such as that presently urged by Interior must undergo the most stringent scrutiny, whether the rule sought to be imposed is characterized as legislative or interpretive.[44] The standard for assessing the propriety of an agency's attempt to apply a new rule retroactively is a balancing of the necessity for an immediate implementation of a new policy against the impact on those affected by the application of the new policy to past conduct conforming to the prior standard. The ends to be served by the retroactive change must be truly imperative to justify the resulting inequities. "The power to require readjustments for the past is drastic . . . it ought not to be extended so as to permit unreasonably harsh action without very plain words." *Brimstone Railroad and Canal Co.* v. *United States,* 276 U.S. 104, 122 (1928). In condemning an attempt by the Interstate Commerce Commission to order a retroactive adjustment of a division of rates set by the parties, *Brim-*

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[44] *See, e.g., Oil Shale Corp.* v. *Morton,* 370 F. Supp. 108, 123-124 (D. Colo. 1973); Davis, *Administrative Law Treatise* § 7.23 (2d ed. 1979); Baird, *Prospective Interpretative Rulemaking,* 25 Business Lawyer 1581 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy,* 78 Harv. L. Rev. 921, 933 (1965); Griswold, *A Summary of the Regulations Problem,* 54 Harv. L. Rev. 398 (1941).

stone echoes the decision in *United States* v. *Alabama R.R.*, 142 U.S. 615, 621 (1892), in which the Court said:

> "[T]he judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."[45]

The Court applied the same doctrine in *Logan* v. *Davis*, 233 U.S. 613, 626-27 (1914), holding that Interior was not free to alter its established construction and application of the Land Grant Adjustment Act of 1887:

> "[T]he question is not altogether new. It has often arisen in the administration of the act, and successive Secretaries of the Interior uniformly have held that the remedial sections embraced purchases after the date of the act, no less than prior purchases, if made in good faith. Many thousands of acres have been patented to individuals under that interpretation, and to disturb it now would be productive of serious and harmful results." (Citations omitted.)

The same principle was applied in *Lane* v. *Hoglund*, 244 U.S. 174 (1917). The Court again held that Interior was not free to depart from an established construction so as to deny patent on a homestead entry which under prior practice would not have been the subject of objection.

The lower courts have often applied the same doctrine. In *NLRB* v. *Guy F. Atkinson Co.*, 195 F.2d 141 (9th Cir. 1952), the Ninth Circuit observed:

> "We think it apparent that the practical operation of the Board's change of policy, when incorporated in the

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[45] *Accord*, *Edward's Lessee* v. *Darby*, 25 U.S. (12 Wheat.) 206 (1827); *United States* v. *State Bank of North Carolina*, 31 U.S. (6 Pet.) 29, 39 (1832).

> order now before us, is to work hardship upon respondent altogether out of proportion to the public ends to be accomplished. The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the act, and who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing our system of law abhors." 195 F.2d at 149.

Accord, Retail, Wholesale and Department Store Union v. *NLRB,* 466 F.2d 380, 391-392 (D.C. Cir. 1972); *Vassilious* v. *District Director of Immigration & Nat. Serv.,* 461 F.2d 1193, 1195 (10th Cir. 1972).

Interior's attempted repudiation of its long-standing discovery rule is not only a gross departure from these principles long enunciated by the courts, but a betrayal of its own well-established policy to confine a changed construction of a statute to prospective application. *See, e.g., Rough Rider and Other Lode Claims,* 42 L.D. 584 (1913), 41 L.D. 242 (1911) (refusing to give retroactive application to a new and more stringent rule of discovery in the porphyry copper district of Arizona); *Hidden Treasure Consolidated Quartz Mine,* 35 L.D. 485 (1907); *Birch Pomeroy Mill Site,* 34 L.D. 320 (1905); *Gowdy* v. *Kismet Gold Mining Co.,* 24 L.D. 191 (1897) (new rule that notice of publication must name adjoining claim not to be applied to prior notices); *French Lode,* 28 L.D. 675 (1896); *Mary R. Leonard,* 9 L.D. 189, 190-191 (1889) (*held,* that a new and more stringent requirement as to satisfaction of the statutory requirement for cultivation of a timber claim as a prerequisite to patent would be given only prospective operation).

Because they involved a question whether to change a discovery rule, as does in this case, and because the geographical area to which the question referred possessed special characteristics, as does the Green River Formation,

the *Rough Rider* decisions, *supra,* deserve fuller consideration. In the 1911 decision Interior had rejected patent applications for claims in the Arizona porphyry copper district where surface mineralization was slight and the underlying valuable mineral deposits were irregular in shape, small in size and often isolated. 41 L.D. at 253. On rehearing in 1913, Interior reversed that decision, holding that, inasmuch as the geologic conditions were the same as those on claims previously passed to patent, the prior rule should continue to apply.[46] Interior's rationale for declining to apply the new rule retroactively in that case should be equally applicable here:

> "It was upon showings such as this that entries and patents were allowed for mining claims in this region at the dates of the locations and entries of the claims here involved. There can be no question therefore that at those times a more liberal rule with reference to mining locations situated in this region prevailed in the land department than that applied by the Department with respect to the claims here in question in its decision of January 31, 1911, and that had said earlier rule been followed with regard to these locations they would in the absence of other objections have been passed to patent. This being true, and it appearing that these locations and others in that vicinity, based on the same character of discovery, had been, in reliance on such rule, purchased and dealt with as property, the Department is now of opinion that the rule under which the entries were canceled should not have been given retroactive application to the prejudice

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[46] Another parallel between *Rough Rider* and this case is that the discovery rule there in question was explicitly reviewed and approved by the Justice Department as was done with the oil shale discovery rule involved here. *See* 42 L.D. at 586-87 and the report of the Justice Department in 1930 to Secretary Wilbur on the oil shale discovery rule. Exs. C-321; C-409. Here, of course, there is, in addition, congressional ratification of the oil shale discovery rule.

> of the owners of the claims, but, on the other hand, that the said previous and long-continued practice of the land department established a rule of property with respect to such claims which should have been adhered to and followed in the determination of this case." 42 L.D. at 587-588.

Interior's oil shale decisions have themselves recognized the vice of retroactivity. *James W. Bell,* 52 L.D. 197, 198-99 (1927), characterized a line of consistent decisions concerning one aspect of the validity and patentability of oil shale claims, as "constitut[ing] a rule of property, and, though the facts vary, [they] are decisive of the principle that a location, otherwise lawful, of mineral land embraced in a subsisting but uncompleted [homestead] entry, constitutes a property right in the highest sense of that term. . . ." In a decision a quarter century ago Interior reaffirmed the rule in *Bell* and refused to depart from it, in further language as apt in this case as that one:

> "The *Bell* decision has been accepted as defining the rights of mineral locators in similar circumstances. The Bureau of Land Management has issued in recent years several mineral patents for oil-shale-placer claims covering lands in this area to mineral locators who reconveyed the surface and unreserved minerals to the United States.
>
> "The rule established in the *Bell* case has been consistently followed for some 30 years. Therefore, it should not be changed in the course of adjudication except for compelling reasons. . . . There appear to be no such compelling reasons in this case. If the rule is to be changed, it should be done by regulation so as to provide for prospective application only." *Union Oil Company of California*, 61 I.D. 106, 108-109 (1953) (citations and footnotes omitted).

In light of these authorities, it will be illuminating to review the administrative practice and rule that Interior

has sought to discard, arguing below only the factitious proposition that the rule was "error."

Formulation and Promulgation of the Rule, 1916-1920

The background of the rule has been sketched above, see pp. 3-10. It is enough here to note that while the rule that Green River Formation oil shale was valuable was first definitively applied in the *Instructions* of 1920, its antecedents dated from 1916, when Interior classified much of the land within the Green River Formation as valuable mineral lands, began to reserve oil shale in homestead patents issued pursuant to the Act of July 17, 1914, selected more than sufficient lands for the new Naval Oil Shale Reserves to allow for previously located claims within the area reserved, and recommended the inclusion of oil shale in mineral leasing legislation precisely because of its value. The formal rule was also anticipated in the numerous Department statements to members of Congress and others favorable to the validity and patentability of claims located for oil shale under the mining laws. The 1920 *Instructions* thus represented the logical and formal enunciation of a position more or less explicitly foreshadowed in Department action and utterance in the four prior years. That prior history afforded ample support for the conclusion expressed in the *Instructions* that "lands valuable on account" of their oil shale deposits "must be held to have been subject to valid location and appropriation under the placer mining laws."[47]

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[47] App. 49-54. The General Land Office was instructed to complete processing of the patent application for the La Paz claims, which had occasioned the full-scale review resulting in issuance of the *Instructions,* in accordance with the procedures of the Petroleum Placer Act and five days later Commissioner Tallman, noting that "the reports of the field men [show] discoveries and expenditures as required by the statutes," clear-listed the application and returned it to the Minerals Division for preparation of patent, which issued on August 9, 1920. App. 55-56.

The Consistent Application of the Rule, 1920-1960

The *Instructions* did not dispense with the need to show that a claim contained substantial deposits of oil shale, but in formally resolving the issue whether such oil shale deposits were "valuable mineral deposits" under the mining laws, they laid the basis for 40 years of consistent administration of the law. Recognition of the value of oil shale of the Green River Formation within the meaning of the mining law is reflected over that period in many ways, amply documented in the record. We can only summarize here the vast body of evidence showing adherence to and reaffirmation of the rule in (i) the patenting of more than 2,000 claims, (ii) Government contest decisions, (iii) private contest decisions, (iv) continued classification of the oil shale lands by the Geological Survey, (v) continued reservation of oil shale in 1914 Act patents, and (vi) the continued and consistent exercise of its rule-making power by the Department in applying and reinforcing the basic rule.

(i) *Patenting.* Interior issued patents on oil shale claims in the Green River Formation in nearly every year from 1920 to and including 1960 (Exs. G-104, C-190), since which latter date patenting has been precluded by Interior's repudiation of the rule. The number of claims patented is 2,326 and the acreage embraced within them is more than 340,000.

Every patent application, as Interior's regulations throughout have required, must show a sufficient original discovery on each claim.[48] Hence, every application necessarily provided the occasion for the reaffirmation of the rule. In examining the application and investigating the claims, General Land Office officials both in the local offices and in Washington were involved, with the latter carefully

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[48] *See* 31 L.D. 453, 477, 484, Regulations, Placer Claims (1901); 35 L.D. 664 (1907); 49 L.D. 15, 58, 61, 73, Regulations, Nature and Extent of Mining Claims (1922); 43 C.F.R. § 3863.1-3(a) (1978).

reviewing the completed application file and preparing and issuing the patent. Substantive defects in an application, such as an issue as to the applicant's showing of a sufficient "discovery of a valuable mineral," would be referred for resolution to a fact hearing, called a contest, initiated by the local land office. This usually arose as a consequence of an adverse report from the field examination, which was a characteristic feature of Interior's careful processing of oil shale applications.[49]

On a number of occasions the Secretary himself personally participated in approving the issuance of oil shale patents. *E.g.*, App. 56, 98, 102-103.

(ii) *Government Contests.* As the sufficiency of discovery was an explicit element of the processing of a patent application, where doubt existed as to that factual issue it was referred for decision to a contest. The record contains numerous examples of contest decisions involving the contention that claims were invalid for lack of discovery, where the facts did not show a physical discovery of oil shale of the richer zones.[50] For example: The first patent application for the Mountain Boy claims resulted in administrative determinations that discoveries had not been made on claims 2-5 and 8 not here in issue; in 1930 the

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[49] The reports of the field examiners in the 1920's show a sophisticated appreciation of the contemporaneous state of efforts to establish an oil shale industry, the belief of locators and applicants in the eventual success of that industry but, equally clearly, uncertainty that the efforts then being made would succeed. Thus Examiner Deitz in a 1921 report stated that while "the future of the oil shale industry is assured" in view of the likely exhaustion of petroleum, "the extraction of oil from shales has not proved to be commercially profitable in this country." Ex. C-107.

[50] First Assistant Secretary Vogelsang reiterated the prudent man rule in 1921: "a discovery would mean the uncovering or exposure of a deposit of oil shale in sufficient quantity and of sufficient value to warrant a person of ordinary prudence in the development and exploitation of the property for the purpose of producing oil and other by-products from the shales. . . ." App. 56.

Secretary ruled that no discovery had been made on the Hope No. 10 claim (Ex. G-538); in 1931 Assistant Secretary Edwards held no discovery had been made on the Annex No. 6 (App. 102).

In addition, thousands of oil shale claims for which no patent applications had been filed, including the Shoup claims, were the subject of recurrent Department investigations in the 1920's and 1930's, and, where applicable, the charge of lack of discovery was made.[51] It is thus clear that Interior applied the 1920 rule in many situations in addition to the claims that went to patent.

(iii) *Private Contests.* Another context in which the issue of discovery could and did arise was a private contest between two rival claimants or applicants to the same land. For example, in *Dennis* v. *Utah,* 51 L.D. 229 (1925), Interior affirmed the validity of an oil shale claim containing significant amounts of oil shale which had been found when the land had been open to location. In *Smallhorn Oil Shale Refining Co.,* 52 L.D. 329 (1928), a contest between an oil shale lease applicant and a homesteader holding a 1914 Act patent and claiming preferential leasing rights, Interior reaffirmed that oil shale lands classified as valuable for oil shale were subject to appropriation under the mining laws. The decision expressly relied on the 1920 *Instructions.*

The most famous private contest was undoubtedly *Freeman* v. *Summers,* 52 L.D. 201 (1927), a dispute between a homesteader (Summers) and the owner of oil shale claims (Freeman) that conflicted with the homestead entry. The controversy, which began in 1923, ended in 1927 with a decision sustaining the validity of the oil shale claims. The final decision has been given importance in the prior decisions in this case because it became a principal focus of the extensive congressional and executive review and hear-

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[51] *See, e.g.,* App. 48, 57-59, 68-69, 101-104.

ings into Interior's administration of oil shale claims in 1930-1931, discussed above. Because that review resulted in vindication of Interior's rules and practices in administering oil shale lands prior to 1930 (pp. 13-15, 39-44, *supra*), the decision of *Freeman* v. *Summers* has subsequently been regarded as significant precedent. In fact, however, it is only the most celebrated and extensively considered case in a consistent series of hundreds of rulings to the same effect from 1916 to 1960. On the point here at issue, *Freeman* v. *Summers* held that oil shale deposits have been "well known for a number of years, and have been the subject of much exploration, study and investigation. They have been recognized by the department and by Congress as a very valuable natural mineral resource. They have been the subject of treatment in a large number of experimental reduction plants, one of which was provided for by Congress and is now in operation [a reference to the Bureau of Mines, oil shale plant at Rulison, Colorado]", that "there has been no considerable production of oil from shales" because of abundant petroleum more cheaply produced from wells, but "there is no possible doubt of its value" and there is no requirement "that the mineral in its present situation can be immediately disposed of at a profit." App. 59-67.

Freeman is significant here because the extensive proceedings included a rulemaking hearing conducted by Secretary Work in 1926 on what should be regarded as a discovery of oil shale, the case resulted in reiteration of the 1920 rule, and the result was widely publicized in Interior's Annual Report for 1927 and otherwise. *See* App. 67-69, 90-96, 98.

(iv) *Continued Classification.* The 1916 classification of oil shale lands was followed in 1919 by both additions and reductions of the area thus classified, as additional land was shown to be valuable mineral land and as some lands originally classified "were found to have insufficient mineral

value to warrant this classification." App. 43. When the petroleum industry became severely depressed by overproduction, the Secretary, by order dated April 15, 1930, withdrew public domain oil shale from leasing. Ex. G-32. To give effect to the order, Interior published *Instructions, Withdrawal of Oil Shale Lands,* 53 I.D. 127 (June 9, 1930), including maps of the areas affected by the withdrawal, which were specified as land containing "oil shale of recognized commercial importance."[52]

In 1957, as noted above, the Geological Survey, taking account among other things of "the grade of shale that was being mined commercially in various parts of the world" (App. 141-142), formulated modified standards for classification of oil shale land. Throughout, the lands within the Mountain Boy and Shoup claims have been classified as valuable oil shale lands. See page 35 n. 22, *supra.*

(v) *Reservation of Oil Shale in 1914 Act Patents.* After the 1916 classification, Interior recognized that land containing oil shale of the Green River Formation was "valuable" mineral land within the meaning of the public land laws by requiring reservations of oil shale in patents issued under the Act of July 17, 1914. *See Brennan* v. *Udall,* 251 F. Supp. 12 (D. Colo. 1966), *aff'd,* 379 F.2d 803 (10th Cir.), *cert. denied,* 387 U.S. 975 (1967). This practice continued consistently thereafter. The record shows that in Colorado alone 196 patents issued under the 1914 Act between 1916 and 1955, covering 41,973 acres, contain reservations of oil shale to the United States. Ex. C-308. The record as to Utah is equally impressive. According to a 1965 memorandum by the State Director for Utah of the Bureau of Land Management, such reservations appeared in patents for 167,731 acres of "lands known to be valuable for oil shale." Ex. C-732.

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[52] Assistant Attorney Richardson observed at the time that the temporary glut of oil "should not serve to diminish or negative the ultimate great economic importance of oil shales. . . ." Ex. C-321, p. 12.

(vi) *Continued Rulemaking.* The 1920 *Instructions,* which formally laid down the rule that oil shale was a valuable mineral within the meaning of the mining laws, were confirmed by subsequent rulemaking actions.

One such occasion occurred in the course of the proceedings in *Freeman* v. *Summers, supra,* at a well-attended public hearing in December, 1926, the significance of which is shown by the fact that Secretary Work himself presided. At that time an intermediate decision in the case had been construed and was being applied by the Field Division as obliging oil shale claimants to satisfy, for purposes of the discovery requirement, the Geological Survey classification standard, that is, that there had been actually exposed on the claim (as distinct from contained within it) a bed of shale meeting the classification standards of richness and thickness. The principal purpose of the hearing was to consider whether the proposed new standard, which departed from a number of previous rulings (see note 11, page 13, *supra*), was appropriate. The rulemaking character of the hearing was expressly confirmed by the Secretary, who stated that "this hearing . . . has definite and exclusive reference to oil shale—particularly to the laws and the regulations. . . . We have to make the regulations under the laws. . . ." App. 93.

The participants at the hearing included a number of oil shale claim owners, attorneys representing claimants, members of Congress, and Interior officials knowledgeable about oil shale. In the course of the hearing it was explained by Interior that the supposed new rule as to physical finding was merely under consideration. A number of arguments against the new rule were advanced, and it was urged that Interior should continue to apply the rule which it had been applying, that what was required to establish a discovery of oil shale in the Green River Formation was a finding of shale in a totality of circumstances such that a prudent man would be justified in further efforts to develop a paying mine at depth. The Secretary indicated that the alternative had much to recommend it (*see* App. 96) and

the question was taken under advisement. Interior's final decision on discovery in *Freeman* v. *Summers,* announced the following year, reaffirmed Interior's prior discovery rule.

In 1927 there was, of course, no *Federal Register,* and Interior had to resort to other means to give wide publicity to the final decision in *Freeman* v. *Summers.* It was published in the official Department reports. It was also referred to at length in Interior's annual report for 1927, which noted with reference to the oil shale deposits of Colorado, Utah and Wyoming that in prior years "these deposits were held to be subject to location and entry under the placer mining laws" and that the subject of oil shale had been one of the "important subjects" before Interior in 1927. The report then stated:

> "Immediately prior to the enactment of the leasing act, numerous locations were made upon the shale areas under the placer mining laws, and many of these locations have been followed by applications for patent. It became the duty of the department to consider these claims and to determine whether the locators had complied with the requirements of the general mining laws. A public hearing, attended by many people interested, was held in the department on December 1, 1926, and the subject was thoroughly discussed. Following this hearing, after extended consideration by the department, decision was rendered in the case of Freeman et al. v. Summers, involving primarily, the question of what constitutes sufficiency of discovery upon certain shale placer mining claims. The department applied the long-established rule that when the locator had discovered mineral within the limits of his claim in a situation and formation that the vein or deposit could be followed to depth, with reasonable assurance that paying minerals will be found, such discovery may form the basis of a patent, where compliance with the law has been had in other respects." App. 68.

Subsequent to *Freeman* v. *Summers,* Interior issued *Instructions* on November 12, 1927, 52 L.D. 333, which among other things reiterated the prevailing rule as to discovery. These instructions showed the continuing effect of the 1920 *Instructions,* for on a minor point (the applicability to oil shale claims of the so-called five claims act) the 1920 *Instructions* were "overruled." 52 L.D. at 334. In 1931 Secretary Wilbur issued directions to the Field Division chiefs in reference to *Freeman* v. *Summers* that any oil shale case "coming within the broad principles laid down in that decision . . . should be adjudicated in accordance with those principles." App. 98. In a 1954 Monograph of the Bureau of Land Management, *Freeman* v. *Summers* was cited as illustrative of Interior's practice of adopting specific rules for the adequacy of discovery in particular districts. App. 113-114. In a memorandum of September 9, 1957, entitled "Sufficiency of Discovery for Oil Shale Placer Claims," the Director of the Bureau of Land Management reiterated the continuing applicability of the rule expressed in the 1920 *Instructions* and in *Freeman* v. *Summers.* App. 120.

Interior's Attempted Repudiation of the Rule, 1961 to Date

In 1961 Interior privately adopted, and in 1964 announced, a new rule on discovery, namely that no oil shale claim was ever "valuable". This reversal was as complete as it was abrupt. From 1961 on, mineral examiners reported as required by the new rule that every pending oil shale claim lacked the requisite "value" in stark contrast to a number of favorable reports a year or two earlier by the same examiners on the same claims.[53] This led, among

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[53] For example, *compare* Ex. C-883 *with* Exs. C-881 and C-885 (on the Mountain Boy claims); *compare* Ex. C-306 *with* Ex. C-305 (on the Sunset claims); *compare* Ex. C-360 *with* Exs. C-307 and C-879 (on the Oyler claims); *compare* Ex. C-294 *with* Ex. 293 (on the Brush Creek claims).

other things, to the return of the Mountain Boy application from Washington, where it had been sent early in 1961 for issuance of patent, and to the institution in 1964 of the current litigation.

The only justification for this reversal (other than to preserve oil shale for leasing because of its great value), has been the bold assertion below that the prior rule was "error". The prior rule had a sound factual basis and was surely within the authority of Interior to adopt as an original matter.[54] The rule was known and ratified by the Congress and was consistently applied for 40 years in thousands of decisions administering the public land laws. Under the authority cited at pp. 58 ff., *supra,* such a rule may not be altered with retroactive effect absent the most compelling circumstances. Interior's 1961 *ipse dixit* that no more oil shale claims should go to patent falls far short of meeting that requirement.

IV. UNDER THE PRINCIPLES OF EQUITABLE ESTOPPEL, THE DEPARTMENT OF THE INTERIOR IS PRECLUDED FROM ASSERTING THAT OIL SHALE OF THE GREEN RIVER FORMATION HAS NEVER BEEN VALUABLE.

As the record demonstrates and as the district court found (Pet. App. 39a ff.), from 1916 through 1960 the Department consistently stated and acted upon the proposition that Green River Formation oil shale deposits were valuable and that pre-Leasing Act claims were eligible for patent. This proposition was expressed for various purposes, including encouragement around 1916-1918 of the location of oil shale claims and private sector efforts to develop a commercial industry. Another purpose was to win the acceptance of the oil shale claimants and their congressional representatives for the inclusion of oil shale in the Mineral Leasing Act of 1920.

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[54] *See, e.g., Udall* v. *Tallman,* 380 U.S. 1, 16-18 (1965).

Indeed, during these years the Bureau of Mines actively assisted private parties, and Interior issued a stream of statements intended to encourage private investment.[55] Thus, in the 1917 Report of Secretary Lane it was stated that:

> "As a result of the investigations of the western oil shales, it is believed that it is now commercially feasible to work selected deposits in competition with oil from wells." A. 18.

A number of Interior witnesses testified at the hearing to the existence of this body of Government utterances encouraging an interest in oil shale and containing statements which if believed could have been expected to induce that interest.[56] The decision of the District Court contains a number of examples. Pet. App. 42a-45a.

In consequence of such statements and actions, many claims were located, many development efforts proceeded, agreement was reached on including oil shale in the Mineral Leasing Act,[57] and over the years since 1920 a great many

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[55] See, *e.g.*, A. 19, 30-31, 36, 125, 127.

[56] Testimony of Messrs. Campbell (A. 138-140), McIntosh (A. 147-148), Schramm (A. 142-143), Phillips (A. 144), and Russell (A. 146-147).

[57] The Department clearly understood the interrelationships among inclusion of oil shale within the Leasing Act, the patentability of prior claims, and private efforts to develop an industry. In 1918 Dr. David Day, one of the Department employees most active in promoting oil shale development, wrote to the Director of the Bureau of Mines:

> "The inclusion of a clause leasing the oil-shale lands . . . in the proposed leasing bill has apparently resulted in an entire suspension of activities toward the development of oil-shale lands in western Colorado. . . . At present it is reported by State Geologist George that all of these efforts toward the erection of plants have shut down until the fate of the leasing bill has been established. Dr. George is of the opinion that the interest in the development of oil-shale lands in western Colorado will cease if the lands cannot be patented." Ex. C-567, pp. 2-3.

persons have expended money and effort in purchasing unpatented oil shale claims, doing work on them, preparing and prosecuting applications for patent, and continuing work on commercial technology.

As the district court found below:

> "Prudent investors [in oil shale] detrimentally relied upon the deliberate actions and statements of high government authorities. Such government encouragement was clearly undertaken in an official capacity, and comports with the subsequent treatment of oil shale both by the Department of the Interior in its *Instructions* of 1920 and by Congress. This is a clear case for the application of equitable estoppel against the government." Pet. App. 40a.

The district court opinion sets forth at length some of the voluminous evidence which can be found in the record and in the contemporary press of Interior's utterances and other Government statements intended to induce private investment in the development of the means by which the oil potential of the Green River Formation might be realized. The result was that "Interest in oil shale revived in the 1910 to 1920 period and has continued to the present time," as both the Examiner and the Board found. Pet. App. 80a, 145a.

The resulting activity was both specific as to the claims in suit and general as to the oil shale region as a whole. Shortly after the 1920 *Instructions,* Carl Schuyler, the grandfather of the family which owns the four Harold Shoup claims in this case, purchased those claims. He spent more than $100,000 in the construction of a commercial plant and another $100,000 in the purchase of claims and the performance of work on them. He and his family also devoted time and funds to defending the claims during Interior's investigation of them in the years 1928-34 and

in preparing and prosecuting the patent application that was filed in 1960.

The Mountain Boy claims Nos. 6 and 7 were purchased in 1920 from the original locators on behalf of a business trust, the beneficiaries of which invested $25,000 and subsequent sums in later years for the purchase price and subsequent assessment and patent work on the claims. Efforts to obtain patent, for which an application was filed in 1924, continued until 1945, when the application was dismissed without prejudice.

In 1956 Shell Oil Company contracted to buy the claims when patented and undertook to advance $12,800 for expenses in perfecting title and obtaining patent. In doing so, Shell understood that Interior had previously ruled favorably (in processing the first application) on the question of discovery on the Mountain Boy claims in suit. By 1964 Shell had spent at least $18,780 in perfecting title to and seeking patent for the claims, as the Board agreed. Pet. App. 117a.

More generally, the efforts and investment induced by the Government's encouragment and Interior's policies were reflected in hundreds of ventures. The decision of the hearing examiner reviews a number of them, confessedly only a sample. Pet. App. 145a-156a. More recently, substantial sums have been expended by companies and individuals in acquisition of land and in the development and improvement of the various steps in the process of mining, crushing, retorting and refining by which the oil shale deposits can be exploited to provide petroleum products and by-products for our increasingly energy-deficient nation. *E.g.*, Pet. App. 156a-157a.

Against this factual background of government-induced private investment and reliance, the district court held the Department estopped from challenging the claims in suit on the discovery grounds advanced, observing that "For

years, top administrators in the Interior Department have recognized the energy potential of oil shale. They themselves generated financial and other interest in its mining." Pet. App. 39a-40a.

The petitioner argues (Brief, p. 44) that "the government cannot be estopped" and that there is not "a single case in which this Court has held that the government was, or could be, estopped" (*id.* at 45). The vigor of that contention is more than somewhat undercut, however, by the petitioner's simultaneous request that the Court reach out to review the estoppel issue, although it was not passed on by the court of appeals and was not a subject of the petition for certiorari, on the ground that "it is important and recurring" and that, moreover, there is a conflict among the circuits as to whether the government can be estopped (*id.* at 43). This seemingly schizophrenic approach reflects the circumstance that, while in the most technical of senses the Court has not "held" the government estopped, its few decisions in the last quarter century that might be thought relevant to the subject are carefully limited statements that by no means preclude estoppel of the government or disavow the increasingly candid doctrinal development that has occurred in recent years among the circuits.

There is, therefore, no point in a review of the early authorities. The most recent decision of this Court to which the petitioner refers is the *per curiam* decision in *Immigration & Nat. Serv.* v. *Hibi,* 414 U.S. 5 (1973), in which the Court continued to leave open, as it had in *Montana* v. *Kennedy,* 366 U.S. 308, 314-15 (1961), the question whether "affirmative misconduct," as distinct from mere inaction, might give rise to an estoppel. *Moser* v. *United States,* 341 U.S. 41 (1951), although redolent of estoppel, does not, at least technically, constitute a decision on that question. In that case the petitioner for citizenship, a Swiss national resident in the United States, had sought exemption from military service in World War II under a Swiss-American

Treaty of 1850, unaware of a subsequent statute that allowed a neutral to claim such exemption only on pain of waiver of any subsequent right to obtain citizenship and "[i]n justifiable reliance" (341 U.S. at 46) on advice from the Swiss Legation (evidently based, in turn, on somewhat ambiguous statements by the State Department) that his exemption application would not cause him to lose his rights to citizenship. The Court, eschewing a conclusion cast in terms of estoppel, stated that "elementary fairness" required nothing less than a knowing waiver of citizenship rights and reversed the denial of his petition. 310 U.S. at 47.

Even cases cited by the petitioner that do talk in terms of estoppel rest on facts obviously distinguishable from the circumstances in this case. One example is *United States* v. *San Francisco,* 310 U.S. 16 (1940), discussed by the petitioner at page 49 of his brief. That case involved an injunction suit to restrain San Francisco from selling electric power derived from the Hetch-Hetchy project in Yosemite Valley to Pacific Gas & Electric Co. in violation of an express condition of the legislation which had made federal lands available to San Francisco for purposes of power generation. Not only was such a sale prohibited, but the statute also imposed a condition subsequent on San Francisco's continued right to use the land if the statutory restriction was not complied with. The city argued, as the last of several points, that the United States was estopped by conduct of its agents from requiring compliance. The Court, in rejecting the argument, responded that, as a factual matter, it was "doubtful" that the Interior Department "at any time ever did more than merely to tolerate" sale and distribution by the utility "as a temporary expedient." 310 U.S. at 31. The distinctions from the present case are obvious: there an explicit statutory prohibition against the conduct taken, here the general terms of the mining laws and the savings clause of the 1920 legislation

which both Congress and the Department thought consistent with recognition of the value of oil shale; there "mere toleration" of certain conduct "as a temporary expedient," here a purposeful affirmative course of conduct implemented at the highest levels of the Department by successive Secretaries over nearly 50 years and repeatedly made known to Congress.[58]

Utah Power & Light Co. v. *United States,* 243 U.S. 402 (1917), another decision cited by the petitioner (Brief, p. 45), likewise rested a rejection of an estoppel argument on mere inaction by federal officials. At issue in that case was the legality of the use by a power company of public domain land largely within forest reservations for a complex of dams, reservoirs, power plants and transmission lines, as to which no federal permit or license had been sought or given. The utility principally relied upon a contention, which the Court summarily rejected, that the State of Utah had the right to dispose of public domain within its border and upon a succession of federal statutes granting limited rights of way for waterways on the public domain, which the Court held had been superseded, so far as relevant to the generation of power, by later statutes requiring a federal permit for which no application had been made. The Court declined to recognize an estoppel based on a few years of Interior Department inactivity in enforcing the federal statutes, on the principal that "laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect

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[58] In light of the political transaction by which, quite clearly, Western support for the inclusion of oil shale in the leasing bill was obtained in exchange for the savings clause (see pp. 7-8, 32-34, *supra*), one further point in the *San Francisco* decision is pertinent. The city's position included the argument that the statutory restriction on the use of Hetch-Hetchy power was unconstitutional, and the Court's opinion notes with some asperity that "[n]ow, the City seeks to retain the benefits of the Act while attacking the constitutionality of one of its important conditions." 310 U.S. at 29.

a public interest." 243 U.S. at 409. Again there is no parallel to the present case. Here there is no mere "laches or neglect of duty" to enforce a statute not complied with. On the contrary, the respondents and their predecessors in interest have scrupulously complied with all of the requirements imposed by the Department in administering the mining laws as applied to oil shale for 40 years. Nor is there in the *Utah Power* case or the *San Francisco* case, or in any other authority on the issue of estoppel of which we are aware, anything comparable to the circumstance, for which the district court opinion cites such a wealth of evidence (Pet. App. 41a-47a), that the activity resulting in the location of the mining claims now challenged by the Interior Department as always having been invalid was affirmatively, overtly, and purposefully solicited and induced by the Interior Department itself.

Lower federal courts have properly recognized that estoppel is a doctrine of fairness and equity,[59] and that "the doctrine of equitable estoppel binds the Government for the conduct of its agents while they are acting within the scope of their employment." *Atlantic Richfield Co.* v. *Hickel*, 432 F.2d 587, 591 (10th Cir. 1970). *Accord, C. F. Lytle Co.* v. *Clark*, 491 F.2d 834, 838 (10th Cir. 1974) ("the defense of equitable estoppel may be applied against government agencies to prevent injustices"); *United States* v. *Wharton,*

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[59] "Repudiation of representations is dirty business, no less at the hands of the government than of its citizens. Hence the claim of immunity for governmental repudiation is tolerable only to the extent that it rests on inescapable compulsions arising out of the needs of government. . . . The claim of the government to an immunity from estoppel is in fact a claim to exemption from the requirements of morals and justice. As such, it needs to be jealously scrutinized at every stop. Confidence in the fairness of the government cements our social institutions. No pinchpenny enrichment of the government can compensate for an impairment of that confidence, for the affront to morals and justice involved in the repudiation of a governmental representation." Raoul Berger, *Estoppel Against the Government*, 21 U. Chi. L. Rev. 680, 707 (1954).

514 F.2d 406, 410 (9th Cir. 1975); *Fox* v. *Morton*, 505 F.2d 254, 256 (9th Cir. 1974); *United States* v. *Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973); *United States* v. *Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970); *see Comment, Emergence of an Equitable Doctrine of Estoppel Against the Government—The Oil Shale Cases*, 46 U. Colo. L. Rev. 433, 440-451 (1975).

The petitioner argues that, in any event, an estoppel will not lie unless the actions of Government officers are "wrongful" or "blameworthy" or constitute "misconduct" (Brief, p. 54). To be sure, such conduct is often present in a situation which calls for an estoppel. The facts of this case, however, go beyond unauthorized and wrongful conduct by a government employee. This case involves the attempted repudiation of the acts of the highest officers of a department of government acting within the scope of their delegated powers.[60] It was the responsibility of the Secretary of the Interior in 1916-1920 to apply the mining laws to the unique situation of oil shale. A standard or rule of discovery was called for and the Secretary, in the exercise of his delegated authority, formulated the standard—definitively expressed in the 1920 *Instructions*. Every successor to the office of the Secretary of the Interior from 1920 to 1961 has adhered to that standard. The Secretary's argument for "wrongful" conduct goes too far. It leads to the conclusion that no authorized act can be the basis of an estoppel.

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[60] The petitioner does not explain how, if, indeed, oil shale was never valuable, it was not wrongful, affirmative misconduct for Secretaries of the Interior from 1916 to 1960 and their subordinates to induce private and congressional action by the "misrepresentation" that oil shale was valuable. Under cases such as *United States* v. *Wharton*, 514 F.2d 406, 412 (9th Cir. 1975), an estoppel would lie. Here as there the Government advice that oil shale lands could be taken to patent was erroneous (if the petitioner's present contentions are accepted) and the status of the land as open to mineral entry for oil shale claims was misrepresented.

The present Secretary's reliance upon *United States* v. *Ruby Co.*, 588 F.2d 697 (9th Cir. 1978), *cert. denied*, __ U.S. __, 99 S. Ct. 2838 (1979), and *Santiago* v. *Immigration & Nat. Serv.*, 526 F.2d 488 (9th Cir. 1975), *cert. denied*, 425 U.S. 97 (1976), is also misplaced. Those cases happen to involve wrongful conduct by lower echelon officials, but they do not say that authorized conduct by the head of a department cannot be the basis for an estoppel. "However the case may be with respect to 'unauthorized' conduct, estoppel clearly may be based upon 'authorized' conduct. The sole tenable argument for the immunity [of government from estoppel] derives from the separation of powers—a consideration which has no play where administrative action is *authorized* by Congress. In such case the government should be and is estopped." Berger, *Estoppel Against the Government*, 21 U. Chi. L. Rev. 680, 687-688 (1954). The recognition accorded the value of oil shale by the Secretary of the Interior in 1920 was at least a permissible and "authorized" application of the mining laws to the Green River Formation oil shale deposits, as evidenced by contemporary congressional agreement with it. It is thus inaccurate to insist, as the petitioner does (*e.g.*, Brief, p. 47), upon the relevance of the proposition that equitable estoppel does not bar correction of an error of law, and therefore does not prevent an administrative agency from substituting a proper regulation in place of a regulation at war with the governing statute. Rather, what is involved here, as the petitioner more or less openly concedes (Brief, p. 57 n. 29), is simply a change of policy, dressed out necessitously as a correction of prior legal error, and, moreover, a change of policy which can only be effective if applied retroactively to recharacterize the legal status of pre-existing claims.

As to the "public interest," it will not be damaged by the patenting of the six claims at issue to any greater extent now than it would have been had these claims come before the Department of the Interior in 1920 or in any of

the years prior to 1961.[61] By contrast, the Department's present "conduct would work a serious injustice if . . . [the Schuyler family, Shell and other owners of unpatented oil shale claims] were divested of the . . . [property] in which they have invested . . ." *United States* v. *Wharton,* 514 F.2d 406, 412 (9th Cir. 1975).

In 1916 the Department had the opportunity to achieve what it now seeks to accomplish. It could have precluded the patenting of oil shale claims by withdrawing the Green River Formation lands from location under the mining laws. But the Department opted not to do so in order to induce the very efforts and expenditures, in locating or patenting claims and work to develop commercial technology, on which the claim owners rely. There is nothing contrary to the public interest in continuing to respect the decision the Department made in 1916 and implemented consistently for 44 years thereafter.

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[61] In their 1918 presentation to the Department and the House Committee on Public Lands the oil shale claim owners had estimated that about 10-15% of the oil shale lands in Colorado would go to patent, and the remaining 85-90% would be developed under leasing once commercial success was demonstrated on the mining claims. App. 73-74. While further claims were located between 1918 and 1920, many claims were subsequently declared invalid by the Department (App. 69, 101, 103-104), and the 10-15% estimate may prove to have been too high. To date some 350,000 acres have been patented (Ex. C-190), which is about 4% of the total oil shale acreage of 8¼ million acres. App. 83. The petitioner's expressed fear (Brief, p. 59 n. 32) that 5 million acres may go to patent if the court of appeals is affirmed is wholly unsupported and is in stark contrast to the fact that in the 40 years between 1920 and 1960 patents issued for only about 7% of that acreage.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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